

# General Evidence

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## 7.1 Chapter Overview

This chapter addresses general evidentiary problems that are likely to arise in criminal cases involving allegations of sexual assault. Sections 7.2-7.3 cover Michigan's rape shield law and character evidence. Sections 7.4-7.6 cover selected hearsay rules (and exceptions). Sections 7.7-7.8 cover prosecutorial discretion and witness competency. Sections 7.9-7.10 cover evidentiary rules applicable to criminal sexual conduct offenses. Sections 7.11-7.12 cover audiotaped and photographic evidence. Section 7.13 covers polygraph examinations and the statutory rights afforded to criminal sexual conduct defendants and victims. Finally, Sections 7.14-7.15 cover various privileges that arise from marital relationships and relationships with service providers.

For information on use of anatomically correct dolls and mannequins, see Section 6.7(C).

## 7.2 Rape Shield Provisions

Michigan's rape shield provisions are contained within a provision of the Criminal Sexual Conduct Act, MCL 750.520j, and a rule of evidence, MRE 404(a)(3). These provisions generally prevent the defendant from introducing evidence of the complainant's past sexual conduct in a prosecution for criminal sexual conduct, except in two narrow circumstances: (1) when the evidence pertains to complainant's past sexual conduct with defendant; and

\*See Sections 6.7(F) and 7.2(B) for information on a defendant's right to confront witnesses and the types of admissible evidence.

\*The cited statutes describe offenses under the CSC Act.

(2) when the evidence pertains to a specific instance of sexual activity showing the source or origin of semen, pregnancy, or disease. Admission of evidence of a complainant's past sexual conduct may also be necessary to preserve the defendant's constitutional right to confront the witnesses against him.\*

## A. Authorities Governing Admission of Evidence of Past Sexual Conduct

MCL 750.520j(1) provides:

“(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's conduct shall not be admitted under [MCL 750.520b to 750.520g]\* unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

“(a) Evidence of the victim's past sexual conduct with the actor.

“(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.”

MRE 404(a)(3) provides:

“(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

\* \* \*

(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.”

The rape shield provisions reflect the policy determination that unlimited inquiry into the sexual history of a complainant may violate the complainant's legitimate expectations of privacy, deter the reporting and prosecution of sexual offenses, unfairly prejudice and mislead the jury, and harass or humiliate the complainant. *People v Arenda*, 416 Mich 1, 8-11 (1982). In applying the Michigan rape shield provisions and reviewing related constitutional claims, trial courts are to proceed on a case-by-case basis. *People v Adair*, 452 Mich 473, 483 (1996). It is important to note that evidence deemed admissible under the rape-shield statute can still be deemed inadmissible on other grounds, such as out-of-court statements that are hearsay and do not fit within a hearsay exception. See discussion under *People v Ivers*, 459 Mich 320 (1998), below, in Section 7.2(F).

## B. Constitutional Right of Confrontation

Under the Sixth Amendment to the United States Constitution and Const 1963, art 1, § 20, a defendant in a criminal case has a right to confront and cross-examine the witnesses against him or her. However, this right of confrontation and cross-examination is not unlimited. It does not, for instance, include the right to present irrelevant evidence. See *People v Arenda*, 416 Mich 1, 8 (1982); and MRE 402. On the other hand, in certain limited circumstances, this right may compel the admission of evidence generally prohibited under the rape shield provisions. *People v Hackett*, 421 Mich 338, 347-348 (1984). In *Hackett*, the Michigan Supreme Court provided examples of circumstances, in addition to those contained in MRE 404(a)(3), in which evidence of the victim's reputation or past sexual conduct may be admissible:

“We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' **bias**, this would almost always be material and should be admitted. . . . Moreover, in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's **ulterior motive for making a false charge**. . . . Additionally, the defendant should be permitted to show that the complainant has made **false accusations of rape in the past**.” *Hackett*, *supra* at 348. [Emphases added and citations omitted.]

## C. Notice Requirements

A defendant must provide notice of an intent to offer evidence of the complainant's prior sexual conduct with the defendant or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. MCL 750.520j(2) provides, in pertinent part:

“If the defendant proposes to offer evidence described in subsection (1)(a) or (b) [regarding a victim's past sexual conduct with the actor or specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease], the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).”

Violation of the notice provisions of the rape shield provisions may result in preclusion of the proffered evidence so long as this preclusion does not infringe on the defendant's Sixth Amendment rights. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302 (1992). In *Lucas*, the defendant was charged with criminal sexual conduct against his former girlfriend. To support his defense of consent, he sought to introduce evidence of their past sexual relationship by way of an oral motion at the start of trial, without complying

with the statutory notice requirements. The trial court refused to allow introduction of the evidence, based solely on the defendant's failure to comply with the notice requirements. Following a bench trial, the defendant was convicted of two counts of CSC III. After various appellate proceedings, the United States Supreme Court held that the notice requirement in the Michigan rape shield statute does not per se violate a defendant's Sixth Amendment rights. The Supreme Court left it to the Michigan courts to determine whether the defendant's rights had been violated in the *Lucas* case. *Michigan v Lucas*, 500 US 145, 152-153 (1991). On remand, the Michigan Court of Appeals held that the constitutionality of preclusions based on the statutory notice requirement must be determined on a case-by-case basis. *People v Lucas*, *supra* at 302. In making this determination, courts should consider the following factors:

- (1) The purpose of the statute to encourage the reporting of assaults by protecting victims from surprise, harassment, unnecessary invasion of privacy, and undue delay. *Id.* at 302-303.
- (2) The purpose of the statute to prevent surprise to the prosecution and to allow time to investigate whether the alleged prior relationship existed. *Id.* at 302.
- (3) The timing of the defendant's offer to produce evidence. The closer to the date of trial the evidence is offered, the greater the suggestion of willful misconduct designed to create a tactical advantage. *Id.* at 303.

After remanding to the trial court to make these findings, the Court of Appeals eventually affirmed the defendant's conviction. The Court of Appeals agreed with the trial court's determination that defense counsel was aware of the statutory notice requirements and made a tactical decision to move to admit the evidence on the date of trial. Moreover, preclusion of the evidence did not prevent defense counsel from presenting the defense of consent, because there was sufficient evidence of the prior relationship to support that defense. *People v Lucas (After Remand)*, 201 Mich App 717, 719 (1993).

#### D. In-Camera Hearing Procedure

MCL 750.520j(2) requires an in-camera hearing where defendant seeks to admit evidence of conduct with defendant or with third persons to show the source or origin of semen, pregnancy, or disease. The defendant may also offer evidence of the victim's past sexual conduct with a third person to preserve his or her right of confrontation. The procedure for determining admissibility of this evidence was set forth in *People v Hackett*, 421 Mich 338, 350-351(1984):

"The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct

simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. . . . We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." [Citations omitted.]

In *People v Williams*, 191 Mich App 269, 273-274 (1991),\* the Court of Appeals considered the initial offer of proof required in *Hackett*. The trial court in *Williams* refused to permit the defendant to question the complainant about an alleged prior sexual assault against her by her uncle. The defendant argued that the evidence would have impeached the complainant's credibility by showing her prior false accusation of sexual assault. The Court of Appeals noted that the defendant had offered no evidence to establish a prior false accusation by the complainant and that defense counsel merely wished to engage in a fishing expedition in the hope of uncovering some basis for arguing that there had been a prior false accusation. The Court observed that the "defendant was not entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false." See also *People v Morse*, 231 Mich App 424, 436-437 (1998), where the Court of Appeals remanded for an *in camera* hearing to determine the admissibility of evidence of the complainants' sexual conduct with someone other than the defendant.

\*This case is also discussed in Section 7.2(H).

## E. Balancing Prejudicial Effect and Probative Value

Under MCL 750.520j(1), a trial court may exclude evidence if "its inflammatory or prejudicial nature *does not outweigh* its probative value." [Emphasis added.] On the other hand, under MRE 403, a trial court may exclude evidence where "its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." [Emphasis added.] It is unclear which standard applies. In *People v Hackett*, 421 Mich 338, 351 (1984), the Supreme Court indicated that the balancing test of MRE 403 should control. But it later indicated a preference for the statute's approach in *People v Adair*, 452 Mich 473, 481 (1996). Although the Court did not state that the factual circumstances were crucial to its holding in either case, *Hackett* involved prior sexual conduct with persons other than the defendant, while *Adair* involved sexual conduct with the defendant. For a discussion of the potential conflict between MRE 403 and MCL 750.520j(1), see *McDougall v Schanz*, 461 Mich 15, 44-46 (1999) (Cavanagh, J., dissenting).

## F. Nature of Admissible Evidence

In the following cases, appellate courts discussed the nature of admissible evidence under the rape shield provisions.

F *People v Ivers*, 459 Mich 320 (1998):

Defendant was convicted of CSC III against a young woman who was visiting a college to decide whether to attend it. The defense was consent. Before trial, defendant sought to introduce testimony by the complainant's friend that, on the day of the alleged rape, the complainant said she had talked with her mother about being "on the pill" and that she was "ready to have sex" and knew it would "probably happen her freshman year at college." *Id.* at 323-324. The trial court excluded this testimony under the rape-shield statute. The trial court also excluded testimony that complainant had asked her friend to "find her a guy" on the night of the alleged assault. In affirming the Court of Appeals, the Supreme Court found that the excluded evidence was admissible under the rape-shield statute since the *statements* did not reveal specific instances of conduct, opinions, or reputation testimony concerning the complainant's *sexual conduct*. *Id.* at 328. The Court explained that, under different circumstances, evidence of a complainant's statements might be deemed sexual conduct and hence excluded under the statute. The Court also added that the critical distinction in the analysis is not between "statements" and "conduct," but between whether the statements reference specific sexual conduct:

"This is not to say, however, that no 'statement' would ever be precluded under the rape-shield statute. For example, hypothetically, had the complainant's statement referenced particular acts, i.e., 'I'm ready to have sex at college since I had sex with X after our high school graduation party,' that would clearly seem to be inadmissible as evidence of 'specific instances of the victim's sexual conduct,' despite having some bearing on the victim's present mental state. Likewise, 'statements' or references to 'statements' made in the course of what is referred to in common parlance as 'phone sex' themselves would seem to amount to a prior instance of sexual conduct, and thus be precluded. The important distinction, however, is not so much 'statements' versus 'conduct' as whether the statements do or do not *amount to or reference* specific conduct. Here it is plain that they do neither, and, thus, evidence of the statements would not be barred by rape-shield concerns." *Id.* at 328-329. [Emphases in original.]

It is important to note that evidence deemed admissible under the rape-shield statute can still be deemed inadmissible on other grounds. Although the majority opinion in *Ivers* did not discuss excluding the complainant's out-of-court statements as hearsay, Justice Boyle wrote a separate concurring opinion to address this issue, discussing the potential of admitting such statements under MRE 803(3), a hearsay exception governing statements of the declarant's then existing state of mind, emotion, sensation, or physical condition. While Justice Boyle agreed with the Court of Appeals dissent that evidence of the complainant's state of mind at the time the statements were

made was not probative of her actual state of mind at the time of the sexual activity, she did write that it is a preliminary question of fact to be resolved by the trial court under MRE 104(a). *Ivers, supra* at 332, 334.

**F** *People v Wilhelm*, 190 Mich App 574, 584-586 (1991):

The defendant was charged with CSC I and kidnapping. In support of his consent defense, defendant sought to introduce evidence that he had seen the complainant expose her breasts to two men in a bar on the night of the alleged assault, and that she had permitted one of those men to touch her breasts. The Court of Appeals found that the complainant's conduct with the other men amounted to "sexual conduct" for purposes of the rape-shield statute, but that the "public nature" of the complainant's sexual conduct did not render it admissible as evidence of sexual conduct with the defendant. The Court further found that exclusion of the evidence did not violate the defendant's constitutional right to confrontation because the evidence was not relevant to the issue of consent.

**F** *People v Mikula*, 84 Mich App 108, 115 (1978):

The defendant was charged with CSC I. At trial, the prosecution introduced expert testimony about the condition of the complainant's genital area to establish the element of penetration. The Court of Appeals held that the Legislature intended that evidence showing physical conditions other than those listed in MCL 750.520j(1)(b) may be admissible if offered to prove an element of the charged offense. Evidence of prior specific instances of the complainant's sexual activity was held admissible to show the origin of her physical condition, even though the particular condition was not expressly listed in MCL 750.520j(1)(b).

## **G. Evidence of Prior Sexual Conduct Involving Defendant**

In the following cases, appellate courts addressed the admissibility of prior sexual conduct evidence involving the defendant.

**F** *People v Adair*, 452 Mich 473 (1996):

The defendant was charged with two counts of CSC III against his wife. The alleged assault occurred a few days after the complainant had been served with divorce papers. She had been married to the defendant for six years and, at the time of the alleged assault, was sharing a house with him. She testified at the preliminary examination that she was sleeping in the basement when the defendant awakened her and committed acts of digital-anal and digital-oral penetration against her will. At a hearing preceding the preliminary examination, she stated that she had engaged in consensual sexual relations with the defendant *after* the alleged assault and that digital-anal sexual activity was a common practice in their marriage. The defendant sought to introduce evidence of both specific instances of the complainant's subsequent sexual relations with him and the marital practice of digital-anal sexual

activity. The trial court allowed introduction only of the complainant's consensual sexual relations with the defendant occurring within 30 days after the alleged assault. An interlocutory appeal was taken.

The Supreme Court considered whether the word "past" in MCL 750.520j(1)(a) refers to the period of time preceding the alleged assault or before the evidence is offered at trial. Finding the term "past" ambiguous, the Supreme Court noted that the primary legislative purpose of the rape shield statute is to exclude irrelevant evidence of the victim's sexual conduct with persons other than the defendant. *Adair, supra* at 480, citing *People v Arenda*, 416 Mich 1, 10 (1982). With this purpose in mind, the Court held that "past sexual conduct" refers to conduct that occurs before the evidence is offered at trial. The Court reasoned as follows:

"The rape-shield statute was grounded in the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues. Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case determination.

"It is axiomatic that relevance flows from the circumstances and the issues in the case. It is primarily for this reason that we reject the argument that otherwise relevant evidence becomes legally irrelevant and inadmissible merely because it occurred after an alleged sexual assault and not before." *Adair, supra* at 483.

The Supreme Court remanded the case to the trial court for a determination of whether the probative value of the proposed evidence was outweighed by its prejudicial nature. The Court advised the trial court to consider: (1) the proximity in time of the alleged assault and the subsequent consensual sexual relations; and (2) the circumstances and nature of the relationship between the complainant and the defendant. The Court directed the trial court to limit admission of evidence to what was necessary for the defense and thus constitutionally required. *Id.* at 486-487. The Court further held that evidence of the couple's digital-anal sexual activity was not relevant to an element of the charges or to defendant's claim that the assault never occurred. *Id.* at 488-489.

F *People v Johnson*, 245 Mich App 243 (2001):

In a non-CSC case, defendant was convicted of two counts of kidnapping and one count of domestic assault and battery. The complainant was a woman who dated the defendant for six weeks but whose relationship with the defendant ended one week before the events at issue. The defense theory was that the complainant made false allegations against the defendant in retaliation for her having contracted herpes from him. The prosecutor moved before trial to exclude evidence that the defendant had transmitted herpes to the complainant. The trial court granted the motion, finding that the evidence was



irrelevant. The Court of Appeals, in a lead opinion written by Judge O'Connell and concurred only in result by Judge Kelly, found that the evidence was relevant to establish that the complainant was biased and that her testimony was fabricated. *Id.* at 261. However, the Court, citing MCL 750.520j(1)(a)-(b), found that the evidence was inflammatory and that its prejudicial nature outweighed its probative value. *Johnson, supra* at 261. There was thus no reversible error in exclusion of the evidence. The Court noted further that, even without this evidence, defense counsel had extensively cross-examined the complainant in an attempt to impeach her credibility. *Id.*

## H. Evidence of Prior Sexual Conduct Not Involving Defendant

In the following cases, appellate courts discussed the admissibility of evidence of prior sexual conduct not involving the defendant.

F *People v Arenda*, 416 Mich 1, 11-13 (1982):

The defendant was convicted of three counts of CSC I arising out of incidents involving an eight-year-old boy. The trial court precluded admission of evidence of the complainant's possible sexual conduct with others. The defendant argued that the evidence was admissible to explain the complainant's ability to describe the sexual acts that allegedly occurred, and to dispel the inference that this ability resulted from experiences with the defendant. The Supreme Court balanced the potential prejudicial nature of this evidence against its probative value in this case and found that application of the rape-shield statute to preclude admission of the evidence did not infringe on the defendant's right to confrontation. The Court noted that other means were available by which the defendant could cross-examine the complainant as to his ability to describe the alleged conduct.

F *People v Hackett*, 421 Mich 338 (1984):

The defendant in *Hackett* was convicted of assault with intent to commit CSC involving sexual penetration. At the time of the offense, both the defendant and the complainant were prisoners. The defendant sought to introduce evidence of the complainant's reputation for homosexuality to impeach his credibility and to show consent. The Supreme Court ruled that evidence of reputation for homosexual unchastity is not relevant to truthfulness, and that evidence of a complainant's reputation for, or specific instances of, homosexuality is not relevant to consent. *Id.* at 351-353.

Consolidated with *Hackett* was *People v Paquette*. In that case, the defendant, before being convicted of CSC I, sought to introduce evidence regarding the complainant's reputation for unchastity and a specific instance of her prior sexual conduct. The Supreme Court found no error in excluding the evidence, noting that evidence of prior sexual unchastity is generally of little or no relevance to the issue of consent. Exclusion of the evidence did not violate the

\*This case is also discussed in Section 7.2(D).

defendant's right to confrontation since that right does not extend to cross-examination on irrelevant matters. *Hackett, supra* at 353-356.

**F** *People v Williams*, 191 Mich App 269, 272-275 (1991):\*

Defendant was convicted of CSC III against a 14-year-old girl who was the babysitter of defendant's girlfriend's children. At trial, defense counsel sought to question the victim about an alleged prior sexual assault by her uncle five years before the trial. Defendant wanted to prove that the victim falsely accused her uncle and that, because of this, her credibility was undermined in the instant case. The trial court, relying upon the rape shield statute, MCL 750.520j(1), refused to allow the defense to question the victim about this prior act. For reasons other than those cited by the trial court, the Court of Appeals affirmed defendant's conviction and held that the trial court reached the correct resolution. The Court found that defense counsel was unable to offer any concrete evidence to establish that the victim made a prior false accusation. The Court also stated that the defense counsel had no idea whether the prior false accusation was in fact false and was simply engaging in a "fishing expedition." However, the Court stated that, had defendant introduced concrete evidence of the prior false allegation, the trial court would have erred by refusing to allow such testimony under the rape shield statute. The Court found that the rape shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. These accusations of sexual assault bear directly on the victim's credibility and the credibility of the victim's accusations in the instant case. The Court held that preclusion of such evidence would unconstitutionally abridge the defendant's right of confrontation.

**F** *People v Morse*, 231 Mich App 424, 429-438 (1998):

The defendant was charged with seven counts of CSC I and two counts of CSC II against two of his former wife's daughters. The trial court ruled that the rape-shield statute prohibited admission of evidence of the child victims' prior sexual mistreatment by someone other than the defendant. The evidence was proffered to show that the victims' age-inappropriate sexual knowledge was not learned from the defendant and to show the victims' motive to make false charges against the defendant. The Court of Appeals found that, to preserve the defendant's constitutional right to confrontation, "the trial court may admit such evidence after adhering to certain safeguards." *Id.* at 436. The trial court was directed to conduct an in-camera hearing to determine whether: (1) the proffered evidence was relevant; (2) the defendant could show that another person was convicted of criminal sexual conduct involving the complainants; and (3) there was sufficient similarity between the facts underlying the previous conviction and the instant charges. *Id.* at 437.

**F** *People v Slovinski*, 166 Mich App 158 (1988):

The defendant was charged with CSC I and unarmed robbery. In an in-camera hearing, defendant sought to introduce evidence that the complainant was a prostitute with whom he engaged in a consensual act of prostitution. The trial

court ruled that it would allow two waitresses to testify as to specific acts and admissions of the complainant to establish that she was a prostitute and to impeach her credibility. The prosecutor appealed the court order before trial. The Court of Appeals affirmed the trial court's order, holding that the proffered evidence of alleged specific acts of prostitution was offered to establish financially-induced consent, and that its probative value outweighed the danger of unfair prejudice under MRE 403. *Slovinski, supra* at 178-179. The Court also held that exclusion of such evidence would violate the defendant's procedural due process rights by precluding the defendant's only defense. *Id.* at 180. However, the Court did point out that its holding was "solely limited to the facts presented," and that it should not be read to "imply that in the future such evidence will always be admissible." *Id.* at 183. The Court added that "we leave for future case-by-case determination the question whether under different facts such evidence will be admitted." *Id.*

**F** *People v Powell*, 201 Mich App 516 (1993):

The defendant was charged with CSC I against a neighbor woman. The defense was consent. In a motion in limine to show that complainant was a prostitute and that the sexual intercourse was a consensual act of prostitution, defendant sought to introduce the testimony of a witness who, before the incident, saw the complainant walking with alleged prostitutes, and, who, after the incident, saw the complainant dancing topless at a local topless club. Additionally, the defendant sought to introduce his own testimony that, two months after the incident, he saw the complainant standing on a corner in a short skirt waving to passing cars. Defendant claimed the evidence was material to his defense of a consensual exchange of money for sexual intercourse. The trial court ruled that the evidence regarding the complainant's employment as a topless dancer and the allegations of her being a prostitute was admissible. The Court of Appeals reversed, holding that the trial court abused its discretion in admitting the evidence because the majority of the evidence was irrelevant to defendant's claim that the complainant was a prostitute from whom he solicited services. *Id.* at 520. The Court noted that employment as a topless dancer does not render someone a prostitute, and that such evidence, which the rape-shield statute was enacted to address, is nothing more than an attempt to place the complainant's questionable character before the jury. *Id.* The Court found the remaining testimony—that complainant was in the company of alleged prostitutes and that she allegedly solicited men from a corner—more prejudicial than probative and self-serving. *Id.*

## **I. Evidence of Complainant's Virginity**

In *People v Bone*, 230 Mich App 699 (1998), the Court of Appeals addressed the admissibility of evidence of a complainant's virginity. The defendant in *Bone* was charged with CSC III. The defense was consent. The Court of Appeals found reversible error in the prosecutor's references to the 16-year-old victim's virginity and in admission of the victim's testimony that she did not scream or resist the defendant's sexual assaults because she had never had

sexual intercourse and was afraid the defendant would hurt her. The Court of Appeals found that MRE 404(a)(3) precludes the use of a victim's virginity to show unwillingness to consent to a particular sexual act. *Bone, supra* at 702. However, the Court also noted that "evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin." *Id.* at n 3.

## 7.3 Evidence of Other Crimes, Wrongs, or Acts

This section addresses the substantive and procedural requirements for admitting evidence of other crimes, wrongs, or acts under MRE 404(b). It also discusses recent cases in which Michigan appellate courts have ruled on the admissibility of "other acts" evidence in the context of criminal cases involving sexual assault.

### A. Admissibility of Evidence Under MRE 404(b)

MRE 404(b)(1) governs the admissibility of evidence of other crimes, wrongs, or acts:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

#### 1. VanderVliet Test

MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993). The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,\* is generally governed by the test established in *VanderVliet*, which is as follows:

- F The evidence must be offered for a purpose other than to show the propensity to commit a crime. *Id.* at 74.
- F The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. *VanderVliet, supra* at 74.
- F The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts. *VanderVliet, supra* at 74-75.
- F Upon request, the trial court may provide a limiting instruction under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the defendant to commit the charged offense. *VanderVliet, supra* at 75.

\*See Section 7.3(A)(2) for the test to admit modus operandi evidence used to prove identity.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- F There is no presumption that other acts evidence should be excluded. *VanderVliet, supra* at 65.
- F The Rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. *VanderVliet, supra*.
- F A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. *Id.* at 78-79.
- F MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet, supra* at 68, 71.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as a rule of inclusion rather than exclusion:

"There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. . . . Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." [Emphasis in original.] *VanderVliet, supra* at 65.

As stated above, other acts evidence will not violate MRE 404(b), unless it is offered *solely* to show a defendant's criminal propensity. Thus, if other acts evidence is admissible for a proper purpose under MRE 404(b), it should not be deemed inadmissible simply because it also demonstrates criminal propensity. In cases where the evidence is admissible for one purpose but not others, the trial court must, upon request, give a limiting instruction pursuant to MRE 105. See *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000); *VanderVliet, supra* at 73-75; *People v Basinger*, 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal because it denied defendant a fair trial); and *People v DerMartex*, 390 Mich 410, 417 (1973) (failure to give properly requested instruction is reversible error). The trial court has no duty to give a limiting instruction sua sponte, however. *People v Chism*, 390 Mich 104, 120-121 (1973).

The continued viability of *VanderVliet's* analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion, was affirmed in *Sabin (After Remand)*, *supra* at 55-59, and in *People v Katt*, 248 Mich App 282, 304 (2001), both of which are discussed in Section 7.3(C).

\*Generally speaking, the *VanderVliet* test supplanted the *Golochowicz* test. However, the *Golochowicz* test remains valid when the proponent of other acts evidence seeks to show identification through modus operandi. *People v Smith*, 243 Mich App 657, 670-671 (2000).

## 2. Golochowicz Test

The admissibility of other acts evidence under MRE 404(b) is not always governed by *VanderVliet's* test. When the proponent is seeking admission of other acts evidence based on a *modus operandi theory to establish identity*, the trial court should employ the test enunciated in *People v Golochowicz*, 413 Mich 298, 309 (1982).<sup>\*</sup> See *VanderVliet, supra* at 66, and *People v Ortiz*, 249 Mich App 297, 303 (2001). The *Golochowicz* test is as follows:

- F There must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced.
- F There must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the scheme, plan, or system in doing the act.
- F One or more of these factors must be material to the determination of the defendant's guilt of the charged offense.
- F The probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 309

### B. Procedure for Determining the Admissibility of Evidence of Other Crimes, Wrongs, or Acts

MRE 404(b)(2) generally provides that the prosecution must give advance notice, preferably before trial, of intent to use other acts evidence, and of its rationale for admitting the evidence. The rule states:

“The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.”

In *People v Hawkins*, 245 Mich App 439, 454-455 (2001), the Court of Appeals identified the following purposes of the notice requirement set forth in MRE 404(b)(2): (1) to force the prosecutor to identify and seek admission of only relevant evidence; (2) to ensure that the defendant has an opportunity to object to and defend against evidence offered under MRE 404(b); and (3) to facilitate a thoughtful ruling on admissibility by the trial court based on an adequate record. In *Hawkins*, the Court of Appeals held that the prosecutor's failure to adhere to the requirements of MRE 404(b)(2) was not reversible error because there was no evidence suggesting that the lack of notice affected the defense or outcome of the case. *Hawkins*, at 455-456.

Under MRE 104, the trial court may conduct a hearing outside the jury's presence to determine the admissibility of “other-acts” evidence. The trial

court is not bound by the rules of evidence, except for those rules governing privileges. MRE 1101(b)(1). Failure to conduct an evidentiary hearing on the admissibility of other acts evidence is not reversible error where the defense makes no motion in limine. *People v Williamson*, 205 Mich App 592, 596 (1994).

MRE 104(a)\* states that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).” The “preponderance of evidence” standard applies to determinations of whether the technical requirements of the rules of evidence have been met. *Bourjaily v United States*, 483 US 171, 176 (1987).

MRE 104(b) deals with the admissibility of evidence, the relevance of which must be established by proof of other facts. This rule states:

“(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”

“Other-acts” evidence proffered under MRE 404(b) may only be relevant if it is shown that the prior misconduct occurred and that the defendant committed it. The court must find sufficient evidence for the trier of fact to conclude, by a preponderance of the evidence, that the conditional fact, i.e., the prior misconduct, has been proven. *Huddleston v United States*, 485 US 681, 690 (1988).

For determinations of admissibility under MRE 104(a), the trial court sits as the trier of fact and determines the credibility of witnesses and resolves conflicts in their testimony. *People v Yacks*, 38 Mich App 437, 440 (1972), and *People v Smith*, 124 Mich App 723, 725 (1983). Regarding the admissibility of evidence under MRE 104(b), the court must not determine the credibility of witnesses or resolve conflicts in their testimony. *Huddleston, supra*.

Where pretrial procedures do not furnish a basis to determine the relevance and admissibility of other acts evidence, the Supreme Court in *VanderVliet* advised:

“[T]he trial court should employ its authority to control the order of proofs [under MRE 611], require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor’s other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues.” *Id.* at 90.

\*This rule applies to determinations of whether the technical or constitutional rules allow admission of proffered evidence.

For a jury instruction on other offenses where relevance is limited to a particular issue, see CJI2d 4.11.

### C. Admissibility of “Other-Acts” Evidence in Cases Involving Sexual Assault

The following appellate cases address the admissibility of “other-acts” evidence under MRE 404(b) when sexual assault is alleged.

**F** *People v Sabin (After Remand)*, 463 Mich 43 (2000):

Defendant was convicted of CSC I against his 13-year-old daughter. According to the complainant, the defendant told her after the assault that if she told her mother, her mother would be upset with her for breaking up the family again. Over defendant’s objection, his *stepdaughter* testified that he performed oral sex on her from the time she was in kindergarten until she was in seventh grade. She testified that the defendant told her not to tell anyone about his conduct because it would hurt the family and because her mother would be angry with them.

On appeal, the Supreme Court found no error in the trial court’s admission of the stepdaughter’s testimony as relevant to the defendant’s scheme, plan, or system. The Supreme Court identified two situations in which evidence of prior acts may properly be offered to show a defendant’s scheme, plan, or system: (1) where the charged act and the uncharged act are parts of a single continuing plan; and (2) where the defendant devised and repeated a plan to perpetrate separate but very similar crimes. *Id.* at 63-64. The case presented the second situation and, notwithstanding dissimilarities between the charged and uncharged acts, the Court found no abuse of discretion in the trial court’s admission of the challenged testimony to prove the defendant’s scheme, plan, or system. The following common features beyond the commission of acts of sexual abuse supported the trial court’s discretionary ruling: (1) the father-daughter relationship; (2) the similar age of the victims; and (3) the defendant’s attempt to silence the victims by playing on their fears of breaking up the family. The evidence was probative of a disputed element—whether sexual penetration occurred—and was properly admitted to show a system that the defendant may have used in sexually assaulting his daughters and, consequently, to rebut the defense of fabrication. The Court noted, however, that under the facts presented the evidence was not admissible to show motive, intent, or absence of mistake, or to bolster the credibility of the victim. *Id.* at 66-71.

**F** *People v Starr*, 457 Mich 490 (1998):

The defendant was convicted of two counts of CSC I and one count of CSC II against his six-year-old daughter. The defendant at trial presented evidence that the victim’s mother fabricated charges. The trial court permitted the prosecutor to introduce testimony by the defendant’s half-sister that the defendant had subjected her to similar, uncharged sexual acts over a 14-year



period beginning when she was four years old. The court gave the jury a limiting instruction regarding this evidence. On appeal, applying the *VanderVliet* standard, the Supreme Court found that the evidence was relevant:

“One of the theories presented by the defense was that the victim’s mother fabricated these allegations of sexual abuse to prevent defendant from having any future contact with [the victim]. To refute this claim that the allegations were fabricated by the victim’s mother, the prosecutor introduced defendant’s half-sister who testified, on cross-examination, that the victim did not reveal the abuse until the victim was directly asked about it by her mother, two years after the abuse occurred. The mother began asking questions about defendant’s behavior with the victim in response to a conversation she had with defendant’s half-sister. During this conversation, defendant’s half-sister confided that she had been abused by her brother since age four and over the course of several years. This information prompted the mother to ask the victim pointed questions about her relationship with defendant, at which time the victim admitted that two years prior, the victim was forced to engage in sexual conduct with him on several occasions. Absent the half-sister’s testimony, the prosecutor could not effectively rebut defendant’s claim that the charges were groundless and fabricated by her mother. . . . Thus, we find the proffered evidence to be probative to refute the defendant’s allegations of fabrication of charges.” *Starr, supra* at 501-502.

**F** *People v Sholl*, 453 Mich 730, 740-742 (1996):

The defendant was convicted of CSC III against a woman with whom he had a dating relationship. On appeal, the Supreme Court found no error in admission of evidence that he had used marijuana on the evening of the alleged offense:

“[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. The presence or absence of marijuana could have affected more than the defendant’s memory. It could have affected the behavior of anyone who used the drug. Further, inferences made by a person about the intended conduct of another might have been affected by the person’s knowledge that the other’s conduct was taking place in a setting where illegal drugs were being used.

“In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty.” *Id.* at 741-742.

**F** *People v DerMartex*, 390 Mich 410 (1973):

The defendant was convicted of assault with intent to rape a ten-year-old Toronto resident who spent part of the summer at the Detroit home of the defendant and his wife. Over defendant’s objection, the victim testified concerning other prior, uncharged instances of defendant’s sexual mistreatment of her both while accompanying her from Toronto to Detroit and while staying at his home. The Supreme Court upheld the admission of this evidence, finding that relevant, probative evidence of other sexual acts

between the defendant and the victim of an alleged sexual assault may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. The Supreme Court explained the purpose for admitting such evidence as follows:

"The principal issue confronting a jury in most statutory rape cases, and particularly so where the charged offense is *attempted* statutory rape, is the credibility of the alleged victim. Limiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy. . . . Allowing the admission of evidence of antecedent sexual acts preceding the charged assault is especially justified where an inchoate offense is charged against a member of the victim's household. Otherwise the testimony of the victim concerning the seemingly isolated unsuccessful assault may well appear incredible." We do not wish to be understood as holding that other acts of sexual intimacy between the parties is always admissible. The trial judge . . . enjoys the discretion of excluding relevant evidence if its probative value is outweighed by the risks of unfair prejudice, confusion of issues or misleading the jury." [Emphasis in original.] *Id.* at 414-415.

\*The *DerMartzex* rule has, however, survived the adoption of the Michigan Rules of Evidence. *People v Dreyer*, 177 Mich App 735, 737 (1989).

The opinion in *DerMartzex* was not decided under MRE 404(b).<sup>\*</sup> In *People v Jones*, 417 Mich 285, 289-290 (1983), the Supreme Court declined to extend its holding in *DerMartzex* to include instances of sexual acts between the defendant and household members *other than the complainant*. However, it did state that such evidence may be admissible under MRE 404(b). *Jones*, *supra* at 290 n 1. While the Supreme Court has declined to reconsider its decision in *Jones*, see *Sabin*, *supra* at 69-70, the Court of Appeals has extended the so-called *DerMartzex* rule to include admission of testimony describing *subsequent*, uncharged sexual acts, *People v Puroll*, 195 Mich App 170, 171 (1992), and to include admission of testimony from victims who were not necessarily members of the same household as defendant: a seven-year-old boy whom defendant often babysat, *People v Garvie*, 148 Mich App 444, 450 (1986), and a 15-year-old niece who was visiting defendant's home at the time of offense, *People v Wright*, 161 Mich App 682, 687-689 (1987).

F *People v Ortiz*, 249 Mich App 297 (2001):

The defendant was convicted of the first-degree murder of his ex-wife. At trial, he claimed that he had consensual sexual relations with his ex-wife, and that she later died in a car accident, despite some testimony showing that she died of asphyxiation by smothering or chest compression. The prosecutor successfully admitted, under MRE 404(b), evidence of sexual misconduct between the defendant and two women. On appeal, the Court of Appeals upheld the trial court's admission of this 404(b) evidence,<sup>\*</sup> finding that (1) the evidence was relevant to rebut defendant's theory of consensual sexual relations; (2) that it was logically relevant to support the theory that defendant had a motive *and* opportunity to kill his ex-wife, since it was established that the ex-wife refused to reconcile the divorce based upon defendant's sexual deviance and since defendant was jailed and released from tether for the

\*The Court of Appeals rejected defendant's argument that the test in *People v Golochowicz*, 413 Mich 298, 309 (1982) should be applied, finding *Golochowicz* applicable only where similar-acts evidence is offered to show *identification* through *modus operandi*. *Ortiz*, *supra* at 303. See Section 7.3(A)(2).

sexual misconduct (with one of the women) ten days before the murder; and (3) that the evidence was not substantially outweighed by the danger of unfair prejudice, because the prior sexual misconduct was not the same crime for which defendant was on trial, a fact which greatly lessened the danger that the jury would conclude that “‘if he did it before, he probably did it again.’” *Ortiz, supra* at 305-307.

F *People v Watson*, 245 Mich App 572 (2001):

The defendant was convicted of three counts of CSC I and one count of assault with intent to commit CSC II against his stepdaughter, who was between 11 and 13 at the time of the charged offenses. On appeal, defendant challenged the trial court’s admission of a cropped photograph found in the defendant’s wallet. The photograph showed the victim’s naked buttocks. The defendant also challenged the admission of an enlargement showing the entire, uncropped photograph. The Court of Appeals found no reversible error in admission of this evidence, ruling that it was properly admitted under MRE 404(b) to show the defendant’s motive:

“[E]vidence in the instant case that defendant had a sexual interest specifically in his stepdaughter would show more than simply his sexually deviant character—it would show his motive for sexually assaulting his stepdaughter. Thus, evidence that defendant carried a photograph of his stepdaughter’s naked buttocks in his wallet had probative value to show that the victim’s allegations were true. Defendant denied sexually assaulting his stepdaughter, but the other-acts evidence demonstrated that he had a motive to engage in sexual relations with her. . . . [T]he other acts evidence involved the specific victim herself, not someone else, as in *Sabin* [where other-acts evidence was admissible to show scheme or plan but not to show motive]. Thus, the other acts evidence showed more than defendant’s propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults.” *Watson, supra* at 579-580.

The Court of Appeals further found that the defendant had not shown that the probative value of the evidence was substantially outweighed by the danger of prejudice. *Id.* at 581.

F *People v Pesquera*, 244 Mich App 305, 316-320 (2001):

Defendant was convicted of two counts of CSC I and five counts of CSC II against five children, aged four to six, who lived in the same mobile home park as defendant. At trial, two other children testified concerning sexual assaults on them by the defendant. The Court of Appeals found that the trial court did not abuse its discretion in admitting this testimony under a scheme, plan, or system theory of relevance. The common features identified by the Court of Appeals were: (1) the defendant and the victims knew each other; (2) the defendant and the victims were friends; (3) the victims were very young; (4) the assaults occurred after the defendant invited the children to play with him; and (5) the assaults involved the defendant’s touching of the children’s sexual organs. The Court found that the evidence was not relevant to absence of mistake or accident.

F *People v Hernandez*, 423 Mich 340 (1985):

Defendant was convicted of two counts of CSC II against a girl under the age of 13. At trial, defendant denied ever touching the alleged victim. At the close of direct examination, after being asked if he ever touched *any* child in a sexual manner, defendant stated “I never touched any child.” The prosecutor, believing that the defendant “opened the door” to rebuttal evidence, sought to introduce evidence that he allegedly kissed another young girl. The trial court, although it initially declined in a motion in limine to admit such evidence, permitted such evidence in rebuttal. The Supreme Court reversed the Court of Appeals and trial court, finding that admission of this evidence in rebuttal was erroneous because it wholly failed to satisfy the standards for admission of such evidence. Specifically, the Supreme Court held that the final question and answer of defendant’s direct examination had nothing to do with “kissing,” as the testimony of the other acts evidence provided, but instead concerned whether defendant had ever touched a child in a sexual manner. The Supreme Court concluded that the admitted rebuttal testimony was contrary to established case law because it rebutted a collateral issue, i.e., an issue not material to the resolution of the case, its prejudicial value outweighed any probative value, and its admission did not disprove defendant’s exact testimony, except as it tended to disprove the denial proffered during the improper cross-examination.

F *People v Katt*, 248 Mich App 282 (2001):

Defendant was convicted of three counts of CSC I against a seven-year-old boy and a five-year-old girl who lived with defendant, their mother, her ex-husband, and another person. At trial, defendant took the stand and denied sexually assaulting either child, further stating that “[I]t’s not my nature to go around and have sex with children.” Because of this statement, the prosecutor renewed a previous motion, denied twice previously by the trial court, to introduce evidence *in rebuttal* of an alleged prior sexual assault against a nine-year-old boy, in which defendant allegedly touched the boy’s “privates” while they both were disrobed after taking a bath together. The trial court admitted the evidence in rebuttal.

In distinguishing *Hernandez*, *supra*, the Court of Appeals affirmed the trial court’s decision, finding that the alleged prior act was properly admitted under the common scheme, plan or system of logical relevance, because the charged and uncharged conduct was “sufficiently similar” to support an inference that they were manifestations of a common system. The Court found the following similarities: (1) the victims and defendant knew each other; (2) the victims were all of tender age; (3) the alleged sexual abuse occurred when defendant was alone with the children; and (4) the improper contact allegedly involved the touching of the children’s sex organs when defendant and the victim’s were disrobed. The Court found that the trial court correctly determined that the prior act had significant probative value and was not substantially outweighed by its prejudicial effect. The Court also found it noteworthy that

the trial court decided to admit the other act evidence after it had the opportunity to view the proofs at trial. *Katt, supra* at 306-309.

F *People v Layher*, 238 Mich App 573, 584-586 (1999), aff'd on other grounds 464 Mich 756 (2001):

The defendant was convicted of one count of CSC I and two counts of CSC II against his niece. The charged assaults occurred while the victim and the defendant were living at the apartment of the victim's grandmother. According to the victim, two of the charged assaults took place while other family members were in the apartment. At trial, evidence of an earlier, uncharged sexual assault by the defendant against the victim, during which the victim's mother was nearby, was admitted. The Court of Appeals found that the prosecutor, by showing that the defendant was willing to risk assaulting the victim while other family members were nearby, properly offered this evidence to rebut the defendant's theory that the victim had fabricated the instant allegations.

**Note:** In *People v Layher*, 464 Mich 756 (2001), the Michigan Supreme Court dealt with a related but different issue: whether it was error for the prosecutor to cross-examine the defendant's private investigator as to bias, since the investigator was previously tried and acquitted of criminal sexual conduct against a child under 13. The Supreme Court upheld such cross-examination, holding that evidence of bias arising from past arrest without conviction is admissible under MRE 403. *Id.* at 769-771.

F *People v Ullah*, 216 Mich App 669, 672-676 (1996):

The defendant was convicted of two counts of CSC I against his estranged wife. At trial, the complainant described a prior beating the defendant had allegedly inflicted upon her. After this testimony, defense counsel objected to "this whole line of questioning." The belated objection was sustained. When the prosecutor continued to question the witness about prior physical encounters with the defendant, the trial court sua sponte excused the jury, giving defense counsel an opportunity to object. The trial court also sua sponte ordered subsequent comments about prior beatings stricken. In the course of the proceedings, the trial court questioned the relevance of the evidence, noting that the prosecutor's stated purpose to show the defendant's character was impermissible. The trial court also found that the testimony was more prejudicial than probative.

The Court of Appeals concluded that the trial court's actions came too late, after the jury had heard unfairly prejudicial testimony. The Court found that the defendant was entitled to a new trial because: (1) the prosecutor did not move to admit the evidence in accordance with MRE 404(b)(2); (2) the prosecutor cited an improper purpose for admitting the evidence; (3) the evidence was not logically relevant to an element of the charged offenses; (4) the trial court found the evidence more prejudicial than probative; and (5) the jury may have given undue weight to the evidence of the defendant's prior conduct. With regard to relevance, the Court stated:

“On this record the testimony regarding the prior beating was not logically relevant to an element of the charged offenses. The prior beating was not accompanied by a demand from defendant for sex. We also find that the prior beating was not relevant to the issue of consent to sexual intercourse because the complainant never testified that she, aware of how violent he could get from the earlier incident, stopped resisting him. If the complainant had testified that she fearfully submitted, the earlier beating would be relevant to vitiate the apparent consent. That situation is not found here because the complainant’s resistance never wavered, and, from reviewing her testimony, we can conclude that defendant was, on this occasion, even more physically violent when he demanded sex than he had been when he physically assaulted her months earlier. We also note that the trial court determined, after the fact, that the testimony regarding the first beating was more prejudicial than probative.” *Ullah, supra* at 675.

## 7.4 Selected Hearsay Rules (and Exceptions)

This section addresses selected hearsay rules (and exceptions) that may be applicable in criminal cases involving sexual assault.

### A. Hearsay Generally

MRE 801(c) defines “hearsay” as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A “statement” is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” MRE 801(a). Statements which are not hearsay include admissions by party-opponents, defined in part as statements which are offered against the party and which are the party’s own statements. MRE 801(d)(2)(A).

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Under MRE 803, MRE 803A, and MRE 804, certain evidence that would otherwise be inadmissible under the hearsay rule is declared admissible.

### B. Present Sense Impression Exception—MRE 803(1)

A present sense impression is defined as “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” A present sense impression is admissible even though the declarant is available as a witness. MRE 803(1).

In *People v Hendrickson*, 459 Mich 229 (1998), the Supreme Court considered the admissibility of a 911 audiotape recording at the defendant’s trial on domestic assault. According to the evidence, the victim telephoned 911 at 12:43 a.m. and stated, “I want someone to pick up” the defendant. In response to the dispatcher’s request for further explanation, the victim stated, “I have just had the living s— beat out of me.” The victim also stated that

defendant was “leaving the house now,” and that she herself was leaving to seek medical treatment. *Id.* at 232. At 7:00 a.m., a police officer interviewed the victim, who described being grabbed around the neck, thrown to the floor, and pummeled by the defendant. The officer observed bruising of the victim’s neck and eye, swelling of her eye, and lacerations on her chin, eye, and lip. He photographed the injuries. After the prosecutor charged the defendant with domestic assault and battery, the victim recanted, claiming that the incident had been her fault. Pursuant to the prosecutor’s policy in such cases, the case proceeded against the defendant. At trial, over the defendant’s objection, the court admitted the audiotape of the victim’s 911 telephone call into evidence under MRE 803(1) as evidence of the assault. The defendant was convicted as charged.

Holding that the trial court properly admitted the audiotape recording under MRE 803(1), the Supreme Court in *Hendrickson*, *supra* at 236, set forth the following three conditions for admission of evidence under the present sense impression exception to the hearsay rule:

- F The statement must provide an explanation or description of the perceived event.
- F The declarant must personally perceive the event.
- F The explanation or description must be substantially contemporaneous with the perceived event.

Four Justices held that evidence is admissible under MRE 803(1) only if there is corroborating evidence that the perceived event occurred. *Hendrickson*, *supra* at 237-238 (lead opinion of Kelly, J.), and 251, n 1 (concurring and dissenting opinion of Brickley, J.). These Justices found that the photographic evidence of the victim's injuries satisfied this requirement in this case. *Id.* at 239-240 (lead opinion of Kelly, J.), and 251, n 1 (concurring and dissenting opinion of Brickley, J.). Three concurring Justices found no requirement of corroboration. *Id.* at 240-241 (concurring opinion of Boyle, J.). Justice Brickley dissented, requiring corroborating evidence of substantial contemporaneity and finding no such evidence in this case. *Id.* at 251-252 (concurring and dissenting opinion of Brickley, J.).

See also *People v Slaton*, 135 Mich App 328 (1984),\* where the Court of Appeals found no error in admission of a tape of the murder victim’s 911 call, ruling in part that, “[The victim’s] statements to [the 911 operator] informing her that some person or persons had broken into his basement . . . as he spoke described an event as he was perceiving that event and were therefore admissible as present sense impressions under MRE 803(1).” *Id.* at 334.

\**People v Slaton* is further discussed in Sections 7.11(B)-(C).

### C. Excited Utterance Exception—MRE 803(2)

An excited utterance is defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement

caused by the event or condition.” An excited utterance is admissible even if the declarant is available as a witness. MRE 803(2).

The prerequisites to admission of evidence under the excited utterance exception to the hearsay rule were stated in *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996), as follows:

- F The statement must arise out of a startling event.
- F The statement must relate to the circumstances of the startling event.
- F The statement must be made before there has been time for contrivance or misrepresentation by the declarant.

A sexual assault is a startling event. See *People v Straight*, 430 Mich 418, 425 (1988) (“Few could quarrel with the conclusion that a sexual assault is a startling event.”); see also *People v Crump*, 216 Mich App 210, 213 (1996) (rape by defendant and his capture was a startling event). Additionally, independent proof of the startling event is required. *People v Burton*, 433 Mich 268, 294-295 (1989). The proffered excited utterance by itself is not sufficient to establish that the startling event took place. *Id.* See also *People v Layher*, 238 Mich App 573, 583 (1999), *aff’d* on other grounds 464 Mich 756 (2001) (strong circumstantial evidence sufficient to establish independent proof that a sexual assault occurred).

\**People v Layher* is also discussed in Section 7.3(C).

The focus of MRE 803(2) is whether the declarant spoke while under the stress caused by the startling event. *Straight*, *supra* at 425. The justification for the rule is lack of *capacity* to fabricate, not lack of *time* to fabricate. *Id.* An excited state may last for many hours after the occurrence of a startling incident. No fixed time period universally satisfies the requirements of the rule. In *People v Smith*, 456 Mich 543, 551-553 (1998), the Supreme Court held that a CSC I victim’s statement made ten hours after the sexual assault was admissible as an excited utterance because it was made while the victim was still under the overwhelming influence of the assault. Similarly, in *Layher*, *supra* at 583-584,\* the Court of Appeals found that a five-year-old sexual assault victim was in a continuing state of emotional shock precipitated by the assault when she made statements during therapy one week after the alleged assault with the aid of anatomical dolls. See also *Kowalak*, *supra* at 559-560 (excited utterance exception applicable notwithstanding delay of 30 to 45 minutes between death threat and statement). However, compare, *People v Gee*, 406 Mich 279 (1979), where the Michigan Supreme Court found reversible error in admitting the complainant’s statements made 12-20 hours after the CSC incident, because the “lapse between event and statement was enough time for consideration of self-interest,” and there was “no plausible explanation for the delay which would excuse the delay . . . .” *Id.* at 283.



In *People v Slaton*, 135 Mich App 328, 334-335 (1984), the Court of Appeals found that the tape recording of a 911 call was admissible under MRE 803(2). The Court found that the statements of both the caller and the 911 operator were admissible because they related to a startling event and were made under the stress of that event.\*

\**People v Slaton* is also discussed in Sections 7.11(B)-(C).

#### D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)

MRE 803(3) allows admission of statements “of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.” Such statements are admissible even though the declarant is available as a witness.

The declarant’s state of mind must be at issue before statements showing state of mind may be admitted under MRE 803(3). See *People v White*, 401 Mich 482, 502 (1977) (victim’s statements showing his fear of the defendant were inadmissible where defendant raised an alibi defense); and *People v Lucas*, 138 Mich App 212, 220 (1984) (testimony of police officer that he believed a defendant’s alibi witnesses was inadmissible under MRE 803(3)).

In *People v Fisher*, 449 Mich 441 (1995), a murder victim made various oral and written statements about the state of her marriage to the defendant-husband, about her insistence on visiting her lover in Germany, and about her intentions on divorcing or separating from the defendant. The Michigan Supreme Court held that the victim-wife’s statements not known to the defendant were admissible under MRE 803(3) to show the victim’s intent, plan, or mental feeling. *Fisher*, *supra* at 450. However, those statements known to the defendant, although relevant and admissible, did not constitute hearsay because there were not used for their truth, but only to show their effect on the defendant-husband. *Id.*

In *People v Howard*, 226 Mich App 528, 554 (1997), the Court of Appeals concluded that a page from a murder victim’s appointment book listing the house where she was killed next to the time that she was killed was admissible under MRE 803(3) to show the victim’s intent, at the time the entry was written, to go to the house. Statements showing a victim’s intent may also be admissible to show the victim’s subsequent conduct when that conduct is at issue in the case. *People v Furman*, 158 Mich App 302, 315-316 (1987), citing *Mutual Life Ins Co of New York v Hillmon*, 145 US 285 (1892).

In *Furman*, *supra* at 317, the Court of Appeals held that the murder victim’s statements indicating her fear, dread, or nervousness of visiting an unidentified male (allegedly the defendant) were inadmissible under MRE 803(3). The statements described the victim’s memories of previous contact

with the man, and the victim's state of mind was not at issue in the case because the defendant claimed that he was not the perpetrator.

See also *People v Ivers*, 459 Mich 320 (1998), discussed in Section 7.2(F), in which Justice Boyle, in a concurring opinion, discussed MRE 803(3) as it related to the hearsay nature of a victim's statements under the rape-shield statute.

### E. Dying Declaration Exception—MRE 804(b)(2)

A dying declaration is defined as “a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.” A dying declaration is admissible only when the declarant is not available to appear as a witness in either a criminal prosecution for homicide or in a civil action. MRE 804(b)(2).

The prerequisites to admission of evidence under MRE 804(b)(2) were stated in *People v Siler*, 171 Mich App 246, 251 (1988), as follows:

- F The declarant must have been conscious of impending death.
- F Death must have ensued.
- F The proponent of the statement seeks its admission in a criminal prosecution against the person charged with killing the decedent.
- F The statement must relate to the circumstances of the killing.

In *Siler*, the Court of Appeals considered the requirement that the declarant must have been conscious of impending death. During the 911 call at issue in that case, the victim told the dispatcher that he had been stabbed in the heart, that he needed immediate assistance, and that defendant had stabbed him. The victim repeated his request for assistance three times. The decedent remained conscious for four to five minutes after the wound was inflicted and was pronounced dead about an hour and a half later, not having regained consciousness. The Court of Appeals found that the 911 tape was admissible, describing the consciousness of death requirement as follows:

“‘Consciousness of death’ requires, first, that it be established that the declarant was in fact *in extremis* at the time the statement was made and, secondly, that the decedent believed his death was impending. But, it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration.” *Id.* at 251. [Emphasis in original.]

## F. Statements Made for Purposes of Medical Treatment or Diagnosis

MRE 803(4) provides an exception to the “hearsay rule,” regardless of the declarant’s availability as a witness, for statements that are:

“... made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.”

The rationale for admitting statements under MRE 803(4) is: (1) the self-interested motivation to speak truthfully to treating physicians in order to receive proper medical care; and (2) the reasonable necessity of the statement to the patient’s diagnosis and treatment. See *Merrow v Bofferding*, 458 Mich 617, 629-630 (1998) (declarant’s statement that his wound occurred after “a fight with his girlfriend” was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment).

In *People v Meeboer (After Remand)*, 439 Mich 310, 322-323 (1992), the Supreme Court listed four prerequisites of admissibility under MRE 803(4) to establish that a hearsay statement is inherently trustworthy and necessary for obtaining adequate medical diagnosis and treatment:

- F The statement was made for purposes of medical treatment or diagnosis in connection with treatment;
- F The statement describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury;
- F The statement is supported by the “self-interested motivation to speak the truth to treating physicians in order to receive proper medical care”;<sup>\*</sup> and
- F The statement is reasonably necessary to the diagnosis and treatment of the patient.

The following subsections describe pertinent areas of the law governing the application of MRE 803(4): (1) trustworthiness of statements based solely upon the declarant’s age; (2) trustworthiness of statements made to psychologists; and (3) statements identifying the defendant as the perpetrator.

### 1. Trustworthiness: The Age of the Declarant

In assessing the trustworthiness of a declarant’s statements, Michigan appellate courts have drawn a distinction based upon the declarant’s age. For declarant’s over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Van Tassel (On Remand)*, *supra* at 662. See also *People v Crump*, 216 Mich App 210, 212 (1996) (adults are presumed to know the need to speak truthfully to

<sup>\*</sup>See the next subsection for a list of ten factors to assist in determining the trustworthiness of statements of patients age ten and under. See also *Meeboer*, *supra* at 324-325.

medical personnel). For declarants ten and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *People v Meeboer (After Remand)*, *supra* at 326. To do this, a trial court must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Id.* at 324. The Supreme Court in *Meeboer* established ten factors to address when considering the totality of the circumstances:

- F The age and maturity of the child;
- F The manner in which the statement is elicited;
- F The manner in which the statement is phrased;
- F The use of terminology unexpected of a child of similar age;
- F The circumstances surrounding initiation of the examination;
- F The timing of the examination in relation to the assault or trial;
- F The type of examination;
- F The relation of the declarant to the person identified as the assailant;
- F The existence of or lack of motive to fabricate; and
- F The corroborative evidence relating to the truth of the child's statement. *Meeboer*, *supra* at 324-325.

See Section 7.5(C) for a discussion of the "tender years" hearsay exception in MRE 803A, which also applies to statements that corroborate statements describing sexual abuse made by declarants under ten years of age.

The following cases applied the *Meeboer* factors to statements made by declarants age ten or younger.

- F *People v McElhaney*, 215 Mich App 269, 279-283 (1996):

On appeal from his three CSC I convictions, defendant argued that the trial court abused its discretion by admitting a physician's assistant testimony concerning statements made to her by a nine-year-old complainant that described a sexual assault by "a man who had given her a ride." The Court of Appeals, after applying the *Meeboer* factors, found the complainant's statements trustworthy. The Court also found that the reliability of the statements was strengthened by the resulting diagnosis and treatment, which corroborated the complainant's statements. The Court also found that the statements were reasonably necessary to the diagnosis and treatment of complainant, because they allowed the physician's assistant to structure the examination and questions to the exact type of trauma experienced, stating: "Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment." *McElhaney*, *supra* at 283.

F *People v Hyland*, 212 Mich App 701, 704-707 (1995):

In appealing his CSC I conviction arising from acts committed against his nine-year-old daughter, defendant argued that the trial court erred in admitting the daughter's statement to her medical doctor describing defendant sexually assaulting her. The Court of Appeals, after applying the *Meeboer* factors, concluded that the trial court did not err in finding that the daughter's statement was inherently trustworthy and in admitting it under MRE 803(4). The Court also presumed that the trial court did not apply the "tender years" hearsay exception in MRE 803A\* because the prosecution gave only one day notice of its intent to use the daughter's allegations of sexual abuse by defendant and that MRE 803A requires more extensive notice.

\*See Section 7.5(C) for more information about the "tender years" hearsay exception in MRE 803A.

## 2. Trustworthiness: Statements to Psychologists

Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. In *People v LaLone*, 432 Mich 103 (1989), a CSC I case, the Supreme Court overturned the trial court's decision to admit the testimony of a psychologist who treated a 14-year-old complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id.* at 109-110 (Brickley, J.). The Supreme Court revisited this question in *Meeboer (After Remand)*, *supra* at 329, reiterating the belief that statements to psychologists may be less reliable than those to physicians. However, the Court also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." *Id.* Accordingly, the Court stated that its decision in *LaLone* should not preclude from evidence statements made during "psychological treatment resulting from a medical diagnosis [of physical abuse]." *Meeboer*, *supra* at 329.

## 3. Statements Identifying the Assailant

When a sexual assault victim seeks medical treatment for an injury, it is possible that the victim's statements may identify the assailant as the "cause or external source" of the injury. If this occurs, trial courts may be called upon to determine whether the assailant's identity is "reasonably necessary to . . . diagnosis and treatment." MRE 803(4). The following cases set forth some general principals for determining whether an assailant's identity is medically relevant.

F *People v Meeboer (After Remand)*, 439 Mich 310 (1992):

In three consolidated cases, all involving criminal sexual conduct against children aged seven and under, the Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4)—as long as the totality of circumstances surrounding the statements indicates trustworthiness. The

Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

“Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .

“Disclosure of the assailant’s identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician’s choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.

“In addition to the medical aspect . . . , the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child’s household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .

“A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for ‘social disposition’ of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.

“Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the courts finds the statement sufficiently reliable to support that exception’s rationale.” *Meeboer, supra* at 328-330.

#### F *People v Crump*, 216 Mich App 210, 212 (1996):

On appeal of his CSC I conviction, defendant argued that the trial court erroneously admitted evidence of the complainant’s statements to medical personnel. The Court of Appeals held that, because the complainant was over ten years old, a rebuttable presumption of truthfulness arose, and defendant failed to overcome that presumption. The Court held that the “victim’s statements to the medical personnel merely described the beatings and rape that led to her injuries.” The Court found “such statements to be well within the parameters of MRE 803(4). Further, the statements were cumulative evidence; the victim testified at trial to essentially the same facts as contained within the medical statements.”

#### F *People v Van Tassel (On Remand)*, 197 Mich App 653, 656 (1992):

In this CSC I case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the probate court in a separate abuse and neglect proceeding. The

Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving a complainant over age ten. Nonetheless, the Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court. The Court also held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." *Van Tassel (On Remand)*, *supra* at 661.

**F** *People v Creith*, 151 Mich App 217 (1986):

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center and another nurse from a hospital emergency room. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen. The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose.

**F** *People v Zysk*, 149 Mich App 452, 458-460 (1986):

The defendant was convicted of CSC I against his former girlfriend, who testified that he sexually assaulted her at knifepoint. At trial, an emergency room nurse who cared for the complainant immediately after the assault testified regarding the complainant's statement during her hospital examination. The Court of Appeals found no reversible error in admission of this evidence under either the excited utterance or medical treatment exception:

"[N]othing in the record indicates that [the complainant's] statement was made for any purpose other than treatment. Second, the witness testified that getting the victim's account is very important in the treatment of a rape victim. If any error occurred, it was in admitting that part of the statement which identified defendant as the attacker. However, since defendant's identification was not at issue, no prejudice to defendant resulted from the admission." *Id.* at 458.

## **G. Business Records of Medical and Police Personnel**

The hearsay rule precludes admission into evidence of police and medical records unless an exception under MRE 803 applies. This section discusses two hearsay exceptions that may apply to such records—the exception for records of a regularly conducted activity under MRE 803(6), and the exception for public records and reports under MRE 803(8). These exceptions apply regardless of the declarant's availability as a witness.

\*MCL 600.2146 also addresses the admissibility of business records. To the extent that this statute conflicts with MRE 803(6) and establishes a “procedural” rule of evidence involving the dispatch of judicial business (and not a “substantive” rule), it has been superseded by MRE 803(6). See *McDougall v Schanz*, 461 Mich 15, 30, 35-37 (1999).

## 1. Records of a Regularly Conducted Activity—MRE 803(6)

MRE 803(6) contains a hearsay exception for records of a regularly conducted activity. Such records are described as follows:\*

“A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

Under MRE 803(6), properly authenticated records may be introduced into evidence without requiring the records’ custodian to appear and testify. MRE 902(11) governs the authentication of a business record by the written certification of the custodian or other qualified person:

“Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

\* \* \*

“(11) *Certified records of regularly conducted activity.* The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that-

“(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

“(B) The record was kept in the course of the regularly conducted business activity; and

“(C) It was the regular practice of the business activity to make the record.

“A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.”

In *People v Jobson*, 205 Mich App 708 (1994), police records were admitted into evidence under MRE 803(6). In that case, a police officer took part in unauthorized police raids at two homes and was convicted of entering a building without the owner’s permission. On appeal, the officer challenged the trial court’s decision to admit into evidence his activity log, which made no reference to the raids in question. The Court of Appeals noted that police



officers are required to record all patrol activity in an activity log, and held that the defendant's log was admissible into evidence under MRE 803(6) and MRE 803(7).<sup>\*</sup> *People v Jobson*, *supra* at 713.

For an example of a case in which a medical record was admitted into evidence under MRE 803(6), see *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998), where the Michigan Supreme Court held that part of plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. In the following cases, the appellate courts found that the proffered business records were not trustworthy because they were prepared in anticipation of litigation.

**F** *Solomon v Shuell*, 435 Mich 104 (1990):

The plaintiff filed a wrongful death action against the City of Detroit and Detroit police officers John Shuell, Michael Hall, and Richard Nixon, after Shuell shot and killed the plaintiff's husband. The trial court dismissed Nixon and granted a directed verdict in favor of Hall and the City of Detroit. The jury returned a special verdict finding that Shuell was negligent, and the court entered a judgment for the plaintiff in the amount of \$20,000.00. On appeal, the plaintiff argued that the trial court improperly admitted four police reports into evidence. Two of the reports were police department homicide witness statements taken during the investigation of the shooting; they contained Shuell's and Nixon's versions of the shooting. The other two reports were preliminary complaint reports. In one of those reports, Hall described his conversation with Shuell immediately after the shooting. In the other report, Shuell described his actions leading up to the decedent's death. In plurality opinions, all seven Justices found that the business records exception in MRE 803(6) was inapplicable because the proffered reports were not trustworthy. *Solomon*, *supra* at 126 (opinion by Archer, J.); 142-143 (opinion by Boyle, J.); and 153 (dissenting opinion by Griffin, J.). The officers making the records had motivation to misrepresent the facts, which indicated a lack of trustworthiness. *Id.* at 126 (opinion by Archer, J.). Their statements were taken during the course of a police homicide investigation that could have resulted in civil liability, criminal prosecution, or interdepartmental discipline. *Id.* This lack of trustworthiness went to the admissibility of the reports, not merely to the weight of the evidence. *Id.* at 128 (opinion by Archer, J.).

**F** *People v Huyser*, 221 Mich App 293 (1997):

The defendant was charged with CSC I against his former girlfriend's daughter. The prosecution retained Dr. David Hickok as an expert witness,

\*MRE 803(7) concerns the absence of an entry in a record described in MRE 803(6).

who examined the victim and prepared a report stating his finding that the evidence was consistent with vaginal penetration. Dr. Hickok was named on the prosecution's witness list but died before trial. A subsequent examination of the victim by a different physician revealed no evidence of vaginal penetration. At trial, the defendant and prosecutor offered conflicting testimony concerning vaginal penetration. Over the defendant's objection, the trial court ruled that Dr. Hickok's report was admissible under MRE 803(6), and one of Dr. Hickok's employees read portions of the report into evidence. After being convicted of CSC II, the defendant appealed and challenged the admission of the report into evidence. The Court of Appeals found that because Dr. Hickok had prepared the report in contemplation of the criminal trial, the report lacked the trustworthiness of a report generated exclusively for business purposes. The report's trustworthiness was also undermined by the results of the subsequent examination. The Court of Appeals reversed the defendant's conviction.

Even if a document is admissible under MRE 803(6), not every statement contained in the document is also admissible. If the document contains a hearsay statement, that statement is admissible only if it qualifies under an exception to the hearsay rule or is admissible as nonhearsay. See MRE 805; *Merrow, supra* at 627; and *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 315-316 (1983). In *Hewitt*, the widow of a man struck by a train brought a wrongful death action against the railroad company. The trial court admitted into evidence a police accident report containing eyewitnesses' statements that the decedent jumped into the oncoming train. Following a jury verdict in favor of the defendant railroad, the plaintiff appealed, arguing that the accident report was admitted in violation of the hearsay rule. The Court of Appeals reversed, holding that the eyewitnesses' statements in the police report were inadmissible. The Court noted that those statements did not fall within the regular course of the eyewitnesses' business, so that the primary foundational requirement for the exception set forth in MRE 803(6) was lacking. *Hewitt, supra* at 325.

## 2. Public Records and Reports—MRE 803(8)

MRE 803(8) contains a hearsay exception for:

\*MCL 257.624 prohibits the use in a court action of a report required by Chapter VI of the Motor Vehicle Code.

"Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624 [parallel citation omitted]."\*

This hearsay exception does not allow the introduction of evaluative or investigative reports. The exception extends only to "reports of objective data observed and reported by . . . [public agency] officials." In *Bradbury v Ford Motor Co*, 419 Mich 550, 554 (1984), in lieu of granting leave to appeal, the Supreme Court modified the judgment of the Court of Appeals and ruled inadmissible under MRE 803(8) an investigative report by the National

Highway Traffic Safety Administration report, also referred to as Office of Defects Investigation report, which detailed alleged malfunctions in Ford Thunderbird FMX automotive transmissions.

Although opinions, conclusions, and evaluations by public officials in public reports are inadmissible under MRE 803(8), objective data observed and reported by these officials is admissible. This distinction is illustrated in *People v Shipp*, 175 Mich App 332, 339-340 (1989). In *Shipp*, the defendant was convicted of voluntary manslaughter arising from his wife's death. The Court of Appeals, in granting the defendant a new trial, held that portions of the autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8). *Shipp, supra* at 340. The Court noted, however, that the examiner's recorded observations about the decedent's body were admissible under this rule. *Id.*

MRE 803(8) precludes the admission of certain police reports in criminal cases. This restriction extends to reports of observations made at crime scenes or while investigating crimes. See *People v Tanner*, 222 Mich App 626, 629-630 (1997) (search warrant affidavit inadmissible). The rule does not, however, exclude routine, non-adversarial observations recorded in police records. The following cases illustrate this distinction.

F *Solomon v Shuell*, 435 Mich 104 (1990):

The plaintiff filed a wrongful death action against the City of Detroit and four police officers after one officer shot and killed the plaintiff's husband. On appeal, four Supreme Court Justices found that certain police reports were not admissible under MRE 803(8) because they were not routine records made in a non-adversarial setting. *Id.* at 143-145 (opinion of Boyle, J.); two other justices signed the opinion and Justice Griffin concurred in this part of Justice Boyle's opinion. *Id.* at 153. These Justices found that the reports were investigative or evaluative reports similar to police reports that are excluded in criminal cases. *Id.* at 143-145 (Boyle, J., concurring).

F *People v Stacy*, 193 Mich App 19, 32-35 (1992):

A jury convicted the defendant of arson of a dwelling. At trial, the prosecution's theory was that defendant set the fire after fighting with James Davis, whom the defendant believed to reside in the dwelling. In an effort to show that someone other than the defendant may have set the fire, defense counsel elicited testimony from Davis that Davis had been involved in a fight with someone other than the defendant, Roderick Rankin. In response, the prosecutor sought to establish that the police officer in charge of the arson investigation had explored this possibility and rejected it. The officer testified that he had interviewed Rankin and verified his alibi by checking another officer's police report, which was based on information gathered prior to the ignition of the fire and in routine response to a call from a person who wanted Rankin to leave her home. The Court of Appeals rejected the defendant's

argument that that police report was erroneously admitted into evidence under MRE 803(8)(B):

“The literal terms of MRE 803(8)(B) would appear to exclude, in all criminal cases, reports containing matters observed by police officers. FRE 803(8)(B) has not, however, been so broadly read . . . In *Solomon v Shuell*, 435 Mich 104 (1990), four justices of our Supreme Court appeared to suggest that the Court might, at some future date, find ‘routine police reports made in a nonadversarial setting . . . admissible in criminal cases . . . .’ 435 Mich 144-145, n 9 (opinion of Justice Boyle; two other justices signed the opinion and Justice Griffin concurred in this part of Justice Boyle’s opinion, 435 Mich 153). See also *United States v Hayes*, 861 F2d 1225, 1229 (CA 10, 1988) (citing cases for the proposition that ‘the exclusionary provision of [Federal] Rule 803[8][B] was only intended to apply to observations made by law enforcement officials at the scene of a crime or while investigating a crime, and not to reports of routine matters made in non-adversarial settings’) . . . . We find this interpretation persuasive and applicable to the Michigan Rules of Evidence.” *Stacey*, *supra* at 33.

The Court of Appeals further found that “no independent inquiry into reliability is required for confrontation clause purposes when MRE 803(8) is satisfied.” *Stacey*, *supra* at 34.

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805. See *In re Freiburger*, 153 Mich App 251, 259-260 (1986) (third-party statements in police reports inadmissible hearsay); and *Hewitt*, *supra* at 325-327 (eyewitnesses’ statements in police accident report inadmissible hearsay).

## H. “Catch-All” Hearsay Exceptions—MRE 803(24) and MRE 804(b)(7)

By invoking MRE 803(24) or MRE 804(b)(7), commonly known as “catch-all” hearsay exceptions, a party may seek admission of hearsay statements not covered under one of the firmly established exceptions in MRE 803(1)-(23). Under MRE 803(24), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

“A statement not specifically covered by [MRE 803(1)-(23)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

If the declarant is unavailable as a witness, a hearsay statement not admissible under the specific exceptions described in MRE 804(b)(1)-(6) may be admissible under MRE 804(b)(7), which is identical to MRE 803(24). A statement is admissible under MRE 803(24) or MRE 804(b)(7) upon a showing of: (1) circumstantial guarantees of trustworthiness equivalent to those of the established hearsay exceptions, (2) materiality, (3) probative value greater than that of other reasonably available evidence, (4) serving the interests of justice and the purposes of the rules of evidence, and (5) sufficient notice.

The Michigan Court of Appeals has discussed the “catch-all” hearsay exceptions in the following cases:

**F** *People v Katt*, 248 Mich App 282 (2001), lv gtd \_\_\_ Mich \_\_\_ (2002):

Defendant was convicted of three counts of CSC I against a seven-year-old boy and the boy’s five-year-old sister. On appeal, he claimed the trial court erred by admitting under MRE 803(24) testimony from a child protective services specialist detailing hearsay statements made by the seven-year-old boy. These statements implicated the defendant in numerous incidents of sexual abuse against both the boy and the boy’s sister. Defendant claimed that the hearsay exception in MRE 803(24) was inapplicable because it was intended only to apply to statements “not specifically covered” by other hearsay exceptions. Defendant claimed that, contrary to the rule’s intent, the statements were “covered” by the tender years exception in MRE 803A, even though they were inadmissible on the basis that they were not the first corroborative statements made by the boy, as required by that rule. The Court of Appeals rejected defendant’s narrow interpretation of MRE 803(24), holding that “where a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24).” *Katt, supra* at 294. However, the Court also held that, to be admissible, the statements must still possess the requisite “particularized guarantees of trustworthiness” and otherwise meet the requirements of MRE 803(24). In this case, the Court found the boy’s statements trustworthy because he voluntarily and spontaneously told the CPS specialist about the sexual abuse, his recitation of facts remained consistent, he had personal knowledge of the sexual abuse, he freely recounted the circumstances without leading questions or coaxing, he was not shown to have a motive to fabricate, and he and his sister testified at trial and were subject to extensive cross-examination. *Katt, supra* at 298.

**F** *People v Lee*, 243 Mich App 163, 170-181 (2000):

The defendant was charged with armed robbery. Statements of the victim, who died before the defendant’s trial, were admitted into evidence at trial under MRE 803(24). In those statements, the eighty-year-old victim identified the defendant as his assailant. The Court of Appeals found that the statements were properly admitted, noting that they had “a particularized trustworthiness.” *Lee, supra* at 179. The victim’s statements identifying his

\*Effective September 1, 2001, former MRE 804(b)(6) was redesignated MRE 804(b)(7).

assailant were consistent, coherent, lucid, voluntary, based on his personal knowledge, and not the product of pressure or undue influence. Further, there was no evidence that the victim had a motive to fabricate or any bias against the defendant, or that the victim suffered from memory loss before the attack. The Court found no indication that cross-examination of the victim would have been of any utility, given his unwavering identification of his assailant, the absence of expectation that his testimony was expected to have varied from his prior identification, and the cognitive decline he suffered after being in the hospital for several days after the attack. *Id.* at 179-181.

**F** *People v Smith*, 243 Mich App 657, 688-690 (2000):

The Court of Appeals found that the trial court erred in concluding that hearsay statements to the police and to the declarant's friend were trustworthy and admissible under the former MRE 804(b)(6).<sup>\*</sup> At the time of her statements to the police, the declarant had been accused of a crime and had good reason to incriminate the defendant to avoid prosecution herself. The Court of Appeals found that the statements to the police thus lacked sufficient trustworthiness. Addressing the declarant's statement to her friend, the Court found that the prosecution wrongfully sought to establish its trustworthiness "by showing that the statement was proved true at a different time or place." Because there was no showing that the statement was trustworthy based on the circumstances surrounding its making, the Court of Appeals ruled that the trial court erred in finding that the statement was trustworthy.

**F** *People v Welch*, 226 Mich App 461, 464-468 (1997):

At his Murder II trial, defendant sought to introduce an eyewitness statement contained within a police report. Contained within that eyewitness statement was another statement, allegedly made by the victim after she was assaulted but before she jumped off a bridge to her death, that she was going to kill herself. The trial court excluded this hearsay evidence, finding that each level of hearsay, particularly the eyewitness statement, lacked sufficient circumstantial guarantees of trustworthiness because a significant question existed concerning whether the eyewitness actually heard the victim make the statement. *Id.* at 465-466. The Court of Appeals, after looking to analogous federal evidentiary rules—FRE 803(24) and FRE 804(b)(5)—applied a federal trustworthiness requirement, which is satisfied when a trial court can conclude that cross-examination would be of "marginal utility." Using this standard, the Court of Appeals found no abuse of discretion in the trial court's finding of untrustworthiness because the cross-examination of the eyewitness "would have been of more than marginal utility." *Welch, supra* at 468.

## 7.5 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

This section reviews cases illustrating how Michigan's appellate courts have addressed testimonial evidence of a defendant's threats of physical harm against a crime victim or a witness to a crime.\* While evidence of a threat is often subject to hearsay objections, it may be admissible either because the threat is not hearsay or because it falls under an exception to the hearsay rule.

- F A threat may be a non-assertive “verbal act” and not hearsay if it is not offered to prove the truth of the matter asserted. Such a threat may, for example, be circumstantial evidence of the declarant's state of mind, including consciousness of guilt, or it may explain a witness's inability to identify the defendant in court.
- F A threat may be non-hearsay if it is an admission by a party-opponent under MRE 801(d)(2).
- F A witness' account of a threat may be admissible as an excited utterance under MRE 803(2).
- F Evidence of a threat may be admissible as a statement of the declarant's then existing mental, emotional or physical condition under MRE 803(3).

**Note:** Threats against a crime victim or witness to a crime may constitute a criminal offense, such as extortion or obstruction of justice. See, e.g., MCL 750.213 (extortion), discussed in Section 3.14; MCL 750.483a (obstruction of justice by interfering with reporting of crimes), discussed in Section 3.23(A); and MCL 750.122 (obstruction of justice by preventing victims from testifying), discussed in Section 3.23(B).

### A. Threats That Are Not Hearsay

In the following cases, a threat against a crime victim or witness was ruled admissible either as an admission by a party-opponent or as evidence offered for a purpose other than to show the truth of the matter asserted.

- F *People v Sholl*, 453 Mich 730, 739-740 (1996) (statements showing consciousness of guilt):

The defendant was charged with CSC III. At trial, the investigating officer testified outside the presence of the jury that, after the commencement of the criminal proceeding, the complainant called him to report that the defendant had threatened her. The officer further testified outside the jury's presence that he asked the defendant if he had talked about killing the complainant, in response to which the defendant acknowledged that, while intoxicated, he “probably did say something like that.” The trial court ruled that the officer could testify as to statements made to him by the defendant. The officer then testified in the presence of the jury that he asked the defendant if he had threatened to shoot the complainant and that the defendant responded that he

\*For a case involving threats to a witness's relative, see *People v Johnson*, 113 Mich App 650, 654 (1982) (holding that the threat was irrelevant where the witness testified).

“probably would have said something like that.” The Supreme Court found no error in admission of this evidence, holding:

“A defendant’s threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt. As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case.” *Id.* at 740 [Citations omitted].

- F *People v Falkner*, 36 Mich App 101, 108 (1971), rev’d on other grounds 389 Mich 682 (1973) (conduct showing consciousness of guilt):

The defendant was convicted of Murder I. On appeal, he objected to a witness’s testimony that he had threatened to kill anyone who testified against him. The Court of Appeals found no error in the trial court’s decision to admit this testimony:

“Testimony showing conduct and declarations of the defendant subsequent to commission of a crime, when the behavior indicates a consciousness of guilt or is inconsistent with innocence, is admissible. Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the fact finders.”

- F *People v Kelly*, 231 Mich App 627, 639-640 (1998) (threat as evidence explaining witness’ inability to identify defendant):

The defendant was convicted of the armed robbery and murder of his former girlfriend. At trial, a prosecution witness testified that two men had offered to sell him items allegedly taken from the victim’s home. When asked if he saw either of the two men in the courtroom, the witness testified, “No. I don’t know.” When asked if he was afraid to come to court, the witness testified that he was “a little bit afraid.” The prosecutor then asked the witness three times if he was afraid to identify either of the two men. After the third question was asked, the trial court sustained the defense objection of “asked and answered.” On appeal, the defense argued that the prosecutor tried to prejudice the defendant by unfairly insinuating that he was dangerous or had threatened a witness. The Court of Appeals, noting that evidence of a defendant’s threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt, found that the prosecutor’s questions did not constitute misconduct and were appropriate attempts to elicit testimony that might explain the witness’ inability to identify the defendant.

- F *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557 (1996) (admission by party-opponent):

The defendant was charged with Murder I for the killing of his mother. At the defendant’s preliminary examination, a witness testified that she had spoken with the victim both by telephone and in person shortly before her death. During these conversations, according to the witness, the victim was



“petrified” because the defendant had threatened to kill her. Applying MRE 801(d)(2), the Court of Appeals concluded that the defendant’s threat was an admission by a party opponent and thus not hearsay.

## B. Exceptions to the Hearsay Rule

Michigan appellate courts have found that testimony regarding a defendant’s threats may be admissible under MRE 803(2) (excited utterance) and MRE 803(3) (then existing mental, emotional, or physical condition).<sup>\*</sup> These exceptions were discussed in the following cases:

<sup>\*</sup>See Sections 7.4(C)-(D), respectively, for further discussion of these exceptions.

**F** *People v Cunningham*, 398 Mich 514 (1976) (excited utterance):

The defendant was convicted of Murder II for killing her husband. The victim was shot to death with a rifle during an argument with the defendant. A police officer called to the scene during the fight testified at trial that, after confiscating a pistol which he saw protruding from the victim’s pocket, he left the scene approximately one hour before the fatal shooting. According to the officer, the victim explained that he had taken the loaded pistol from the defendant because she had threatened to shoot him with it. The defendant unsuccessfully objected to the officer’s testimony regarding the threat on the basis of hearsay. The testimony was admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant’s conviction was affirmed by an equally divided Supreme Court. Three Justices found that the challenged testimony was double hearsay in that it consisted of the police officer testifying as to what the decedent had told him concerning the defendant’s threat. These same Justices also found that the decedent’s statement was not admissible as an excited utterance because it was not made immediately after a startling event to which it related and was thus not “spontaneous and unreflecting.” *Id.* at 520-521 (opinion by Kavanagh, C.J.). Justice Williams concurred that the contested statement was inadmissible hearsay but found that its erroneous admission was harmless. *Id.* at 523 (Williams, J., concurring in part, dissenting in part). Two Justices found no error in the trial court’s ruling. *Id.* at 525-526 (Coleman, J., dissenting).

**F** *People v Kowalak (On Remand)*, 215 Mich App 554, 556-559 (1996) (excited utterance):

The defendant was charged with Murder I for the killing of his 82-year-old mother. On the day of her death, the victim had testified against the defendant at a child custody/visitation hearing. As a result of the victim’s testimony, the defendant was denied visitation rights with his children. At the defendant’s preliminary examination, a witness testified that she spoke with the victim “shortly after” the visitation hearing and that the victim was “petrified” because the defendant had threatened to kill her. The trial court ruled that the testimony was admissible as an excited utterance under MRE 803(2) (or as evidence of then existing mental, emotional, or physical condition under MRE 803(3)). The Court of Appeals affirmed. First, it found that the defendant’s alleged statement to his mother that he was going to kill her was an admission

by a party-opponent and thus not hearsay. MRE 801(d)(2). Second, it found that the witness's testimony regarding the victim's statement about the threat was admissible under MRE 803(2) as an excited utterance.

F *People v Paintman*, 92 Mich App 412, 420 (1979), rev'd on other grounds 412 Mich 518 (1982) (evidence of then existing mental, emotional, or physical condition):

The defendant was convicted of four counts of Murder I. At trial, a witness testified that he saw the defendant and a codefendant leave a victim's apartment just before the bodies of that victim and two others were found in the apartment. The witness also testified that the codefendant had threatened to kill one of the victims found in the apartment. On appeal, the Court of Appeals upheld the trial court's decision to admit testimony concerning the codefendant's threat against the victim, ruling that it was a declaration of the codefendant's state of mind. The statement was relevant to the codefendant's intent in killing the victims and therefore to the defendant's guilt as an aider and abettor.

### C. Statements Made by Child Under Age 10

MRE 803A codifies the Michigan common-law hearsay exception known as the "tender years" rule. See Note to MRE 803A. Although a prosecutor need not corroborate the victim's testimony under the CSC Act,\* MRE 803A permits corroborative testimony in cases where the sexual assault victim is under ten at the time the statement was made. MRE 803A provides:

"A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

"(1) the declarant was under the age of ten when the statement was made;

"(2) the statement is shown to have been spontaneous and without indication of manufacture;

"(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

"(4) the statement is introduced through the testimony of someone other than the declarant.

"If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

"A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

"This rule applies in criminal and delinquency proceedings only."

\*See MCL 750.520h and Section 7.9 for more information on the CSC Act's corroboration provision.

In *People v Dunham*, 220 Mich App 268 (1996), the Court of Appeals upheld the admission of testimony from a Friend of the Court mediator corroborating the six-year-old victim's statements. The Court of Appeals concluded that the statements were spontaneous. The mediator testified that the victim's statements were in response to open-ended questions typically asked of the children of divorcing parents. The eight- or nine-month delay in reporting the alleged sexual abuse was justified given the victim's fear of the defendant. The Court of Appeals also concluded that defendant was not prejudiced by receiving notice of the prosecutor's intent to offer the testimony one day before trial commenced. The defendant should have anticipated the testimony because the victim's mother testified at the preliminary examination that she became aware of the abuse after the victim spoke with the mediator, and the mediator's name appeared on the witness list for trial. *Id.* at 272-273.

See also *People v Hammons*, 210 Mich App 554, 558 (1995) (daughter's fear of defendant-father's reprisals excused victim's delay in reporting for several days).

## 7.6 Former Testimony of Unavailable Witness

In cases involving allegations of sexual assault, the victim is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness's earlier testimony or other statement as substantive evidence under hearsay exceptions contained in MRE 804(b)(1) and (6), which are the subject of this section.\*

MRE 804(b) provides in part:

“(b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

“(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”\*

\* \* \*

“(6) *Statement by declarant made unavailable by opponent*. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”\*

See also MCL 768.26, which provides:

“Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.”

\*For a general discussion of the hearsay rule, see Section 7.4.

\*See also MCL 768.26.

\*MRE 804(b)(6) became effective September 1, 2001.

MRE 804(a) defines “unavailability” as including situations where the declarant:

“(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

“(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

“(3) has a lack of memory of the subject matter of the declarant’s statement; or

“(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

“(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.\*

“A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

\*A diligent, good faith effort to procure the declarant’s attendance is required under MRE 804(a)(5). *People v Bean*, 457 Mich 677, 684 (1998).

The Supreme Court has held that evidence within MRE 804(b)(1), a firmly rooted hearsay exception, bears satisfactory indicia of reliability and is admissible without violating a defendant’s constitutional right to confrontation. *People v Meredith*, 459 Mich 62, 70-71 (1998).

For purposes of MRE 804(a), “unavailability” is to be understood according to its ordinary meaning. *Meredith, supra* at 66. The requirement of “unavailability” was further discussed in *People v Adams*, 233 Mich App 652 (1999). In *Adams*, the defendant was charged with assault with intent to murder, felony firearm, felon in possession of a firearm, and fourth-offense habitual offender. The complainant was his former girlfriend. After the initial preliminary examination date was rescheduled, the mother of the defendant’s new girlfriend shot at the complainant. At the preliminary examination, the complainant was reluctant and fearful to testify, but did so anyway. She was subpoenaed to appear at trial. On the morning of trial, she met with the prosecutor, who described her as “very nervous about being here.” She then left without warning before the proceedings began. After an unsuccessful two-hour search, the prosecutor asked the court to either adjourn the trial or to declare her unavailable and admit into evidence her preliminary examination testimony under MRE 804(b)(1). Stating that the complainant may have simply changed her mind about pursuing the charges, the trial court dismissed the charges. The prosecutor appealed. The Court of Appeals reversed, finding that the complainant’s abrupt departure and evasion from detection made her “unavailable” under the “ordinary meaning of the word” for purposes of MRE 804(a)(2). The Court further found that the complainant’s preliminary examination testimony was admissible under MRE 804(b)(1), and that use of the former testimony would not violate the defendant’s constitutional right to confront witnesses. *Adams, supra* at 658-660.

In *People v Williams*, 244 Mich App 249 (2001),\* the defendant was charged with assault with intent to do great bodily harm (and third-offense habitual offender) against his girlfriend. The complainant testified at the preliminary examination about the assault and at an evidentiary hearing about two prior incidents where defendant had beaten her, one of which was ruled admissible at trial. On the day of trial, the victim failed to appear. The prosecutor requested the trial court to either grant a continuance and issue a bench warrant or to proceed to trial and use the complainant's former testimony from the preliminary examination and evidentiary hearing. The trial court dismissed the charges, concluding that the victim did not want to prosecute. The Court of Appeals reversed and remanded, holding that the trial court usurped the prosecutor's exclusive authority to decide whom to prosecute. Regarding the complainant's former testimony, the Court of Appeals held:

"Here, despite the victim's failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed by showing that the victim was an unavailable witness. MRE 804(a)(5); MCL 768.26; MSA 28.1049. Rather than dismiss the charges, the trial court should have proceeded to make a determination whether the prosecution had shown due diligence in attempting to procure the victim's attendance at trial. MRE 804(a)(5); *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If due diligence were shown, the victim's testimony from the preliminary examination or the evidentiary hearing could have been utilized at trial if defendant 'had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.' MRE 804(b)(1)." *Williams*, *supra* at 254-255.

\**People v Williams* is also discussed in the next section, which covers prosecutorial discretion and the non-participating witness.

## 7.7 Prosecutorial Discretion and the Non-Participating Witness

**Note:** The legal issue of prosecutorial discretion usually involves a balance of powers constitutional question between the executive and judicial branches. Nonetheless, this issue is discussed here, in the general evidence chapter, because the Benchbook does not contain any one section on balance of power disputes.

The prosecutor has exclusive authority to decide whether to go forward with a case when the complaining witness is absent or does not want to participate. In *People v Morrow*, 214 Mich App 158 (1995), the Court of Appeals found that the trial court exceeded its authority in dismissing, at the pretrial conference, four counts of CSC I and one count of CSC II. The complainant in this case testified at the preliminary examination that the defendant repeatedly raped her. However, at the pretrial conference, the complainant testified that she lied during the preliminary examination and that she actually had consensual sex with defendant at the time of the incident. The trial court sua sponte dismissed the case with prejudice. The Court of Appeals found that under "unique facts of this case," the trial court, in dismissing the information, impinged on the prosecutor's executive branch powers. *Id.* at 165. It also found that the complainant's decision to recant her previous testimony before trial should not alone preclude the prosecution from reaching the jury:

“It is the province of the jury to determine which of the victim’s accounts is the truth, and there is no abuse of power in the prosecutor relying upon and arguing for the victim’s earlier sworn testimony in support of the criminal charges against defendant.” *Id.*

\*The *Williams* case is also discussed in the preceding section, which covers the evidentiary concerns of admitting former testimony of unavailable witnesses.

In a more recent case, the Court of Appeals found that a trial court usurped a prosecutor’s exclusive authority when it dismissed a case after the complaining witness stated repeatedly that she did not want the defendant prosecuted. In *People v Williams*, 244 Mich App 249, 252-253 (2001),\* the defendant was charged with assault with intent to do great bodily harm and third-offense habitual offender. The complainant, defendant’s girlfriend, testified at the preliminary examination that she was severely beaten and sustained a broken nose, broken jaw, and fractures of numerous other facial bones. Although she did not see her attacker, she believed it was defendant, because he had physically abused her in the past, and she saw him waiting outside the bar after she refused to leave the bar with him. The complainant also testified at a pretrial evidentiary hearing, describing two prior incidents when the defendant had beaten her. During that testimony, she stated repeatedly that she did not want the defendant prosecuted. She was subpoenaed for trial but failed to appear. The prosecutor requested a continuance (and a bench warrant for the complainant) or, alternatively, permission to use her former testimony. The trial court denied both requests and dismissed the case, concluding that the circumstances amounted to a private crime, not a public one, and that the complainant has a right not to prosecute the case. The Court of Appeals reversed, finding that the trial court usurped the prosecutor’s exclusive authority to decide whom to prosecute:

“The trial court relied on the notion that because the victim and defendant were involved in a personal relationship, this assault amounted to a private, rather than a public, crime. The trial court further opined that it was the victim’s right to have the charges dismissed because she had evidenced a desire not to prosecute. This is a notion that has pervaded those criminal cases that are commonly known as domestic assaults, but is a rationale that is unsupported by the law.

“Our Legislature enacted the Michigan Penal Code to . . . define crimes and prescribe the penalties for crimes. [Citations omitted.] In other words, as a matter of public policy, the code defines what acts are offenses against the state. The authority to prosecute for violations of those offenses is vested solely and exclusively with the prosecuting attorney. Const 1963, art 7, §4; MCL 49.153; MSA 5.751. A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. [Citations omitted.] The prosecution is not for the benefit of the injured party, but for the public good. [Citations omitted.] Crimes not only injure the victim, but society in general, and the conviction of a crime results not only in a sentence enumerating the punishment in quantitative amounts, but also carries with it society’s formal moral condemnation.” *Id.* at 252-253.

In so holding, the Court of Appeals acknowledged that crime victims have statutory and constitutional rights under Const 1963, art 1, §24 and MCL 780.751 et seq. However these rights do not encompass the authority to

“determine whether [the Penal Code] has been violated or whether the prosecution of a crime should go forward or be dismissed.” *Id.* at 254.

At preliminary examinations, the prosecutor need not place the complaining witness on the stand to testify. Although MCL 766.4 provides in part that “[a]t the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution . . .,” the Court of Appeals has held that the complainant is not required to testify at a preliminary examination if other sufficient evidence is produced. *People v Meadows*, 175 Mich App 355, 357-359 (1989).

## 7.8 Competency of Witnesses

Every person is presumed competent to be a witness. MRE 601 provides:

“Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence].”\*

\*MCL 600.2163 previously required the court to determine the competency of witnesses under ten years old. That statute was repealed by 1998 PA 323, effective August 3, 1998.

Competency to testify is a matter within the discretion of the trial court. The trial court may conduct an examination to determine a witness’ competency. *People v Bedford*, 78 Mich App 696, 705 (1977). If an examination is conducted, the court may question the proposed witness or allow counsel to do so. *People v Garland*, 152 Mich App 301, 309 (1986). The court’s examination of the witness may be, but is not required to be, outside the jury’s presence. See *People v Washington*, 130 Mich App 579, 581-582 (1983); and *People v Wright*, 149 Mich App 73, 74 (1986). A defendant’s constitutional right to confront witnesses is not necessarily violated by the defendant’s exclusion from a competency hearing. *Kentucky v Stincer*, 482 US 730, 739-744 (1987).

In determining whether a witness will be able to testify understandably and truthfully, the court should evaluate the witness’ ability to observe, remember, and recount what has been observed and remembered. The court should also evaluate the witness’ understanding of the duty to tell the truth. *United States v Benn*, 476 F2d 1127, 1130 (1972). If these abilities exist on a level that allows the witness to participate meaningfully in the proceedings, determination of the degree of the witness’ abilities must be left to the trier of fact. See *People v Jehnsen*, 183 Mich App 305, 307-308 (1990) (four-year-old victim competent to testify); *People v Norfleet*, 142 Mich App 745, 749 (1985) (reversible error in finding seven-year-old witness incompetent to testify); and *People v Breck*, 230 Mich App 450, 457-458 (1998) (developmentally disabled complainant competent to testify).

For information on MRE 803A, the hearsay exception governing statements made by a child under ten, see Section 7.5(C). For information on MRE

803(4), the hearsay exception governing statements made to medical personnel, see Section 7.4(F).

## 7.9 Corroboration of Victim's Testimony in CSC Cases

In Michigan, to prove criminal sexual conduct, a prosecutor does not have to corroborate a victim's testimony. MCL 750.520h provides:

\*The cited statutes describe offenses under the CSC Act. See Chapter 2.

"The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b to MCL 750.520g]."\*

The noncorroboration rule is also expressed in a criminal jury instruction. CJI2d 20.25 provides:

\*This jury instruction does not specify applicable charges.

"To prove this charge,\* it is not necessary that there be evidence other than the testimony of [*name complainant*], if that testimony proves guilt beyond a reasonable doubt."

**Note:** The noncorroboration rule in CJI2d 20.25 accurately states the law contained in MCL 750.520h. *People v Smith*, 149 Mich App 189, 195 (1986) (addressing CJI 20:1:01, which was later redesignated CJI2d 20.25).

The purpose of the noncorroboration rule was explained by the Court of Appeals in *People v Norwood*, 70 Mich App 53, 57 (1976):

"The purpose of the anti-corroboration rule is not to save verdicts in which inadmissible corroborating evidence is introduced. It is designed to permit a verdict to withstand a challenge to the sufficiency of the evidence in a case in which the only testimony against the defendant is that of the complainant." [Citation omitted.]

While MCL 750.520h is limited in application to offenses under the CSC Act, the Court of Appeals has held that CJI2d 20.25 is not so limited. In *People v McFall*, 224 Mich App 403 (1997), after being convicted of assault with intent to commit CSC involving sexual penetration and CSC IV, the defendant argued on appeal that the trial court violated his constitutional right to equal protection by giving a "no corroboration necessary" jury instruction. In defendant's view, because this instruction was only supposed to be given in CSC cases, it necessarily exalted CSC "complainants above other crime victims by instructing jurors that their testimony alone can justify conviction." *Id.* at 413. The Court of Appeals in *McFall* rejected defendant's equal protection attack under the United States and Michigan Constitutions, upholding the use of CJI2d 20.25:

\*The Court did not specify these non-CSC offenses.

"Defendant's argument must fail because his premise, that CJI2d 20.25 is given only in cases involving charges of criminal sexual conduct, is without factual support. This Court is aware of no authority, nor has defendant cited any, establishing that this instruction cannot be given in cases involving other offenses.\* Moreover, it is well established that trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the



official sanction of the Michigan Supreme Court.” *McFall*, *supra* at 413-414. [Citation omitted.]

The Court of Appeals also noted that CJI2d 20.25 is included in the “Sex Crimes” chapter of the Michigan Criminal Jury Instructions (2d ed), which includes jury instructions for all CSC crimes and even some additional sex crimes, such as gross indecency, sodomy, indecent exposure, pandering, and accepting the earnings of a prostitute.\* *McFall*, *supra* at 413.

\*See Chapter 3, for more information on these criminal offenses.

Notwithstanding the noncorroboration rule expressed in MCL 750.520h and CJI2d 20.25, a prosecutor may choose to corroborate the victim’s testimony through physical or testimonial evidence. In fact, one rule of evidence speaks directly to such corroboration. Under the “tender years” exception in MRE 803A, hearsay statements of a declarant under ten years old that describe a “sexual act” performed on the declarant by the defendant or an accomplice may be used to corroborate the declarant’s testimony at that proceeding. See Section 7.5(C) for more information on MRE 803A. In contrast, a prosecutor may comment in closing argument on a *defendant’s* failure to produce corroborating witnesses whenever the defendant takes the stand and testifies on his own behalf. *People v Jackson*, 108 Mich App 346, 351-352 (1981).

On the related issue of bolstering a complainant’s credibility and improper prosecutorial argument, see *People v Leshaj*, 249 Mich App 417 (2002) (it was improper, in a CSC case where the jury verdict hinged on witness credibility, for the prosecutor to argue during closing argument that the complainant was “very religious” and that her deep sense of faith precluded her from consenting to premarital sex.)

For potential voir dire issues involving corroboration, see Section 6.14.

## 7.10 Resistance to Perpetrator in CSC Cases

To prove criminal sexual conduct, a prosecutor does not have to show that the victim resisted the actions of the perpetrator. MCL 750.520i provides:

“A victim need not resist the actor in prosecutions under [MCL 750.520b to MCL 750.520g].”\*

While a victim’s resistance to the perpetrator is generally not an element in any criminal offense, it was expressly made a statutory nonrequirement for criminal sexual conduct offenses. The provisions of MCL 750.520i reflect the belief that a victim’s lack of resistance to a perpetrator’s actions should not negate the crime itself. They also reflect the belief that there are legitimate reasons for a victim’s nonresistance. For instance, a victim may have the capability to resist but voluntarily choose not to, such as when the victim believes that resistance will cause even greater harm or death. Indeed, a victim may be so frightened and panicked at the thought of being seriously harmed or killed that he or she becomes physically immobilized by the fear or does not know what to do to thwart the sexual assault. A victim may also be

\*The cited statutes describe offenses under the CSC Act. See Chapter 2.

physically unable to resist a perpetrator's actions because of restraints, intoxication, unconsciousness, mental incapacity, or physical helplessness. For more information on reasons why CSC victims may not resist perpetrators, and on why the resistance requirements of Michigan's former rape statute were eliminated, see Note, *Michigan's Criminal Sexual Assault Law*, 8 U of M J of L Reform 217, 225-227 (1974); Note, *Criminal Law—Sexual Offenses—A Critical Analysis of Michigan's Criminal Sexual Conduct Act*, 23 Wayne L Rev 203, 205-206 (1976); and Boyle, *The Criminal Sexual Conduct Act*, 43 Det Lawyer 6, 7-8 (October 1975).

\*The *Carlson* case is discussed in detail in Section 2.5(I)(1).

For three Michigan cases dealing with CSC complainants who did not resist the actions of the sexual assault, see *People v Carlson*, 466 Mich 130, 132-133 (2002)\* (a CSC III case where the complainant did not physically restrain or push the defendant away, but told him “no” or “I don’t want to” many times before he sexually penetrated her vagina); *People v Makela*, 147 Mich App 674, 677-678 (1985) (a CSC III case where the complainant was too scared and frightened to try to get away or to say anything to thwart the alleged forcible sexual intercourse); and *People v Jansson*, 116 Mich App 674, 678-679, 683 (1982) (a CSC III case where the victim was so frightened and panicked that she did not know what action to take to thwart the forcible sexual intercourse).

For potential voir dire issues involving resistance, see Section 6.14.

## 7.11 Audiotaped Evidence

This section addresses the admissibility of audiotapes, with particular emphasis on “911” tapes. The discussion concerns three issues that commonly arise when such evidence is introduced at trial:

- F Authentication (MRE 901).
- F Hearsay objections.\*
- F Relevancy questions (MRE 401 and 403).

\*See Section 7.4 for a detailed discussion of the applicable hearsay rules.

### A. Authentication

Authentication of evidence is governed by MRE 901(a), which provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(b) provides a non-exhaustive list of authentication techniques that meet the requirements of MRE 901(a). Two of the listed techniques apply directly to audiotaped evidence:

“(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or

recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

“(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.”

In *People v Berkey*, 437 Mich 40 (1991), the Supreme Court considered the admissibility of audiotapes recorded by a murder victim several months before her death. The tapes contained recordings of conversations between the victim and her husband, who was convicted of her murder. At trial, the victim’s neighbor identified the voices on the tapes as those of the victim, the defendant, and their children. At a previous hearing outside the jury’s presence, the neighbor testified that she was not present when the tapes were made and did not know what tape recorder was used, who made the tapes, whether the tapes contained entire conversations, whether the tapes had been changed, or whether the recorded statements were made voluntarily. Applying MRE 901(a), the Supreme Court found that the audiotapes had been sufficiently authenticated, holding that “[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.” *Berkey*, *supra* at 50.

MRE 901 has governed the admissibility of audiotaped evidence since its adoption in 1978. However, the Supreme Court in *Berkey* noted that the former standard, a seven-part test enunciated in *People v Taylor*, 18 Mich App 381, 383-384 (1969), still continues to be an important consideration for the *factfinder* in weighing evidence, and that it may lead to exclusion of a recorded conversation notwithstanding evidence identifying the voices in the recording. *Berkey*, *supra* at 53. The seven-part test in *Taylor*, *supra* at 383-384, requires:

- (1) a showing that the recording device was capable of taking testimony,
- (2) a showing that the operator of the device was competent,
- (3) establishment of the authenticity and correctness of the recording,
- (4) a showing that changes, additions, or deletions have not been made,
- (5) a showing of the manner of the preservation of the recording,
- (6) identification of the speakers, and
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

## B. Hearsay Objections to Audiotaped Evidence

\*See Section 7.4 for a general discussion of the hearsay rule.

In some cases, information on an audiotape does not constitute hearsay, either because the “statement” was not offered to prove the truth of the matter asserted or because the information was not a “statement.” In *City of Westland v Okopski*, 208 Mich App 66, 77 (1994), admission of a tape-recorded 911 call was not prohibited by the hearsay rule because it was offered to show why the police responded rather than to prove the truth of the matter asserted. Also, in *People v Slaton*, 135 Mich App 328, 335 (1984), the Court of Appeals found that background noises in a 911 tape were not statements and thus did not satisfy the definition of hearsay.\*

\*See Sections 7.4(B)-(C) and (E), respectively, for a discussion of these hearsay exceptions.

In cases where audiotaped evidence falls within the definition of hearsay, Michigan appellate courts have upheld the admission of 911 tapes under the present sense impression, excited utterance, and dying declaration exceptions to the hearsay rule.\*

## C. Exclusion of Audiotaped Evidence Under MRE 403

MRE 403 permits exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” In the following cases, the Court of Appeals considered the admission of 911 tapes into evidence over defense objections under MRE 403 that the probative value of the evidence was substantially outweighed by its prejudicial effect.

**F** *People v Slaton*, 135 Mich App 328 (1984):

At the defendant’s trial for felony murder, a 911 operator testified regarding a call from the victim. During the call, the victim reported that someone had broken into his home. The operator spoke to the victim for about five minutes, heard the telephone drop, and then heard banging noises, the victim yelling, and two voices demanding money. Portions of the 911 tape were admitted into evidence under the excited utterance and present sense impression exceptions to the hearsay rule. On appeal, the defendant argued that the tape was irrelevant, that its prejudicial value was reduced by the availability of the operator’s in-court testimony, and that the prejudicial effect of the tape outweighed its probative value. The Court of Appeals disagreed, finding that the tape was relevant to whether the victim’s injuries were inflicted by those who broke into his home, and of the credibility the defendant’s alibi. *Id.* at 332-334.

The Court further found that the probative value of the tape was not outweighed by its potentially prejudicial effect:

“Included in the edited portions of the 911 tape heard by the jury were [the victim’s] calls for help and pleas not to be hurt, followed by his muffled moans. We agree with defendant that these sounds were likely to elicit an emotional response from the jury. We do not,

however, agree that the effect of these sounds upon the jury was so prejudicial to the issue of defendant's guilt or innocence as to require exclusion of this otherwise highly probative evidence. Defendant's voice was not identified as one of the voices on the tape, leaving the question of defendant's involvement in the crime to be decided in light of other evidence. We cannot say that the trial court abused its discretion in its balancing of the probative value and prejudicial effect of the 911 tape as evidence." *Id.* at 334.

**F** *People v Siler*, 171 Mich App 246 (1988):

After the preliminary examination, the district court bound over defendant for trial based on an audiotape of the victim's call to 911 that identified defendant as the attacker. Defendant was eventually convicted by jury of Murder II. On appeal, defendant claimed the trial court should have excluded the 911 tape under MRE 403 because it was more prejudicial than probative. The Court of Appeals disagreed, finding that the evidence of guilt, while always prejudicial, was not unfairly prejudicial to the defendant:

"[The victim's] statement that defendant had stabbed him was relevant because it was proof of the crime of murder with which defendant was charged. The tape was extremely probative because no one saw defendant stab [the victim]. Evidence of guilt is always prejudicial. Only if it would unfairly prejudice defendant should probative evidence be excluded. We hold that defendant was not unfairly prejudiced by the admission of this evidence and that the trial court did not abuse its discretion in admitting the 911 tape." *Siler*, *supra* at 252-253 [Citation omitted.]

**F** *People v Schmitz*, 231 Mich App 521, 534-535 (1998):

The defendant was convicted of Murder II and felony firearm. Although reversing and remanding for a new trial on other grounds, the Court of Appeals found no error in the trial court's decision to admit into evidence a tape recording of an eyewitness's 911 telephone call. The Court noted that the evidence, although generally cumulative to the eyewitness's trial testimony, was not unduly emotional. The Court found no abuse of discretion in the trial court's balancing of the probative value of the recording and its prejudicial effect or cumulative nature.

## 7.12 Photographic Evidence

This section addresses the admissibility of photographic evidence, which includes digital and analog images. The discussion concerns two issues that commonly arise when such evidence is introduced at trial:

**F** Authentication (MRE 901).

**F** Relevancy questions (MRE 401 and 403).

## A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

MRE 901(b)(1)-(10) provides a non-exclusive list of examples of appropriate means of authentication:

- F Testimony of witness with knowledge;
- F Nonexpert opinion on handwriting;
- F Comparison by trier or expert witness;
- F Distinctive characteristics and the like;
- F Voice identification;
- F Telephone conversations;
- F Public records or reports;
- F Ancient documents or data compilation;
- F Process or system; and
- F Methods provided by statute or rule.

\**People v Berkey* is discussed in Section 7.11(A).

Proper authentication of a videotape was found in *People v Hack*, 219 Mich App 299, 308-310 (1996). In that case, the defendant was convicted of child sexually abusive activity based on a videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts. Citing *People v Berkey*, 437 Mich 40, 50 (1991),\* the Court of Appeals found that the videotape was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question.

For a case addressing a photograph of a sexual assault victim, see *People v Riley*, 67 Mich App 320 (1976), rev'd on other grounds 406 Mich 1016 (1979), where the Court of Appeals upheld the trial court's decision to allow into evidence a photograph of the victim's "bruised backside." The victim testified that the photograph accurately reflected the condition of her body at the time the picture was taken. The Court of Appeals found that this testimony was sufficient authentication, and that the photographer's testimony was not required:

“All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it

accurately reflects the scene photographed. . . . We believe that a person is familiar with the appearance of one's own body, and therefore complainant was qualified to identify the picture in question." *Id.* at 322-323.

## B. Relevancy Questions Under MRE 401 and 403

According to MRE 401:

“‘[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

In general, “[a]ll relevant evidence is admissible.” MRE 402. An exception to this general rule is set forth in MRE 403, which provides:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In *People v Mills*, 450 Mich 61 (1995), the Michigan Supreme Court applied MRE 401 and MRE 403 in reviewing a trial court’s decision to admit 17 color slides of a victim’s severe burn wounds in the trial of two defendants charged with assault with intent to commit murder. In determining admissibility under MRE 401, the Supreme Court first considered whether the proffered slides were “material.” To be material, a fact need not be an element of a crime, cause of action, or defense, but it must be “in issue,” i.e., it must be within the range of litigated matters in controversy. *Mills, supra* at 68. The Court noted that all elements of a criminal offense are “in issue” when a defendant pleads not guilty. It further noted that such evidence is not inadmissible merely because it relates to an undisputed issue. *Id.* at 69, 71. The Court addressed whether the proffered slides had “probative force,” defined as *any* tendency to make a material fact more or less probable than it would be without the evidence. *Id.* at 68. Applying these principals, the Court concluded that all 17 slides were relevant under MRE 401 because they were probative of facts “of consequence”—namely, the elements of the crime and the credibility of witnesses—as follows:

- F They showed the nature and extent of injuries, and were thus probative of the defendants’ intention to kill.
- F They corroborated other evidence of the circumstances of the alleged crime.
- F They demonstrated the victim’s state of mind, which was relevant to the victim’s credibility. *Id.* at 68-74.

Having concluded that the slides were relevant, the Supreme Court considered whether the probative value of the slides was substantially outweighed by the danger of unfair prejudice. In this inquiry, the Court cited its previous opinion

in *People v Eddington*, 387 Mich 551 (1972), where it rejected the notion that the prosecution must pursue alternative proofs before resorting to photographic evidence and adopted the following test for admissibility of photographs:

“Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.

“When a photograph is offered the tendency of which may be to prejudice the jury, its admissibility lies in the sound discretion of the court. It may be admitted if its value as evidence outweighs its possible prejudicial effect, or may be excluded if its prejudicial effect may well outweigh its probative value.” *Id.* at 562-563, quoting 29 Am Jur 2d, Evidence, § 787, p 860-861.

Applying this standard, the Supreme Court in *Mills* concluded that the relevancy of the slides was not substantially outweighed by the danger of unfair prejudice. The Court found that the slides were accurate factual representations of the victim’s injuries. The Court further noted that, in deciding to admit 17 slides into evidence, the trial judge had reviewed 30 out of 150 slides, excluding those that appeared to be repetitive, gruesome, or unfairly prejudicial. *Mills*, *supra* at 77-80.

See also *People v Herndon*, 246 Mich App 371, 413-414 (2001) (photographs accurately portraying brutal murder scene probative of intent to kill and of cause of death, and not unfairly prejudicial).

\**People v Watson* is also discussed in Section 7.3(C).

In *People v Watson*, 245 Mich App 572 (2001),\* the defendant was convicted of sexually assaulting his stepdaughter. On appeal, he challenged the trial court’s admission into evidence of a cropped photograph, and an 8” x 10” enlargement of the photograph, showing the victim’s naked buttocks. There was evidence that the defendant carried the cropped photograph in his wallet. He argued that the photograph was inadmissible because it was offered only to show that he was a “sexual pervert,” which made it more likely that the victim’s allegations of sexual abuse were true. The Court of Appeals disagreed, finding that the evidence was admissible under MRE 404(b) to show the defendant’s motive to have sexual relations with his stepdaughter. Rejecting the defendant’s argument that the evidence was inflammatory, the Court noted that the evidence had strong probative value and that the defendant had not shown that the danger of unfair prejudice substantially outweighed that value. In addition, the Court found that the enlargement was



properly admitted to show the entire photograph and that there was no reversible error in the admission of an 8" x 10" print instead of a smaller print. See also *People v Riley*, 67 Mich App 320, 323 (1976), rev'd on other grounds 406 Mich 1016 (1979) (photograph of sexual assault victim's bruised backside held admissible over objection that it was unduly prejudicial, where the defense was consent).

**Note:** Digital photographs are increasingly being introduced as evidence in sexual assault cases. The procedure and standard for admitting digital photographs should be no different than the procedure and standard for admitting other photographs. See *Almond v State*, 553 SE2d 803, 805 (2001), where the Georgia Supreme Court stated: "We are aware of no authority . . . for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera." Although digital photographs may be altered and enhanced, they have no monopoly on such tampering, since regular photographs may also be altered and enhanced. Any such tampering, regardless of the type of photograph, may constitute a criminal offense and subject the offender to criminal penalties. However, perhaps because digital images can be more easily altered and enhanced than other photographs, intentionally or unintentionally, one unit of the Michigan Department of State Police (MSP) has developed Standard Operating Procedures for handling digital images taken at crime scenes or autopsies. Although not adopted for use by all MSP units and posts, these procedures are designed to ensure that the images remain unaltered and to establish the chain of evidence. They require that images taken on a digital system be: (1) downloaded unopened to the hard drive of a computer; and (2) copied unopened from the computer hard drive onto a serial-numbered WORM (write once, read many times) compact disc. (Once an image is copied onto a WORM CD, it cannot be altered.) If requested by a prosecutor or defense attorney, copies of digital images will be made from the compact disc. The disc is to be handled with the same precautions as any other piece of evidence, with the same chain of custody concern.

## 7.13 Polygraphs

Although generally inadmissible as evidence, polygraph examinations\* and their results do serve some utility outside the courtroom. For instance, law enforcement personnel, prosecutors, and defense attorneys can use the results of a polygraph examination, or an offer to take one, as a discovery tool to determine whether to further investigate a case, issue a charge, extend a plea offer, or proceed to trial. Because a criminal case can be influenced in this manner, alleged perpetrators and victims sometimes agree to take polygraph examinations as an attempt to buttress their credibility and to persuade law enforcement officials that they are telling the truth.

In criminal sexual conduct cases, the rights, duties, and notice requirements governing the requesting and taking of polygraph examinations are specifically controlled by MCL 776.21. This statute, along with interpretive case law, is discussed below.

\*For a general discussion of the polygraph method, see *Scientific Evidence* (MJI, 1994), Chapter 11.

## A. Testing Rights

### 1. Defendants Charged With Criminal Sexual Conduct Offenses

Under MCL 776.21(5), “[a] defendant who allegedly has committed [any of the following criminal offenses] shall be given a polygraph examination or lie detector test if the defendant requests it”.\*

- F First-degree criminal sexual conduct, MCL 750.520b.
- F Second-degree criminal sexual conduct, MCL 750.520c.
- F Third-degree criminal sexual conduct, MCL 750.520d.
- F Fourth-degree criminal sexual conduct, MCL 750.520e.
- F Assault with intent to commit criminal sexual conduct, MCL 750.520g.

A defendant’s absolute right to request and take a polygraph examination is not unlimited. Although MCL 776.21 is silent regarding the time-frame for the administration of polygraph examinations, the Court of Appeals has imposed time requirements for requesting and administering polygraph examinations. A defendant does not have a statutory right to receive a polygraph examination once a trial has commenced and jeopardy has attached. See *People v Phillips*, 251 Mich App 100, 107 (2002) (holding that a defendant must make a motion *before* trial to exercise the statutory right to a polygraph test). See also *People v Sterling*, 154 Mich App 223, 234 (1986), where the Court of Appeals, noting that MCL 776.21 only requires an examination “where the defendant has ‘allegedly’ committed criminal sexual conduct,” held that a defendant does not have a statutory right to receive such an examination *after conviction* but *before sentencing*. However, MCL 776.21 does not require that a polygraph be administered *before* the defendant’s preliminary examination. See *People v Rogers*, 140 Mich App 576, 579-580 (1985) (holding that if the Legislature had intended that a polygraph test must be given to a defendant before the preliminary examination, the language of the statute would have specifically stated so).

A defendant does not have a right under MCL 776.21(5) to impose criteria for the administration of the polygraph examination. In *People v Manser*, 250 Mich App 21 (2002), the defendant asserted his right to a polygraph examination under MCL 776.21(5) but declined to take the examination because it was not going to be tape-recorded. The Court of Appeals held that MCL 776.21(5) does not entitle a defendant to have a polygraph examination tape recorded. *Id.* at 31-32. The Court of Appeals also held that, based on MRE 401’s relevancy requirements, the trial court did not err in refusing to allow defendant the opportunity to place testimony on the record indicating that he had the right to take the polygraph and that the police refused to administer the examination. *Id.* at 32.

\*MCL 776.21(5) refers to a “defendant” of a CSC crime. Accordingly, the right to receive a polygraph should not extend to persons who have not yet been charged and who are only suspected of committing a CSC crime.

## 2. Victims of Criminal Sexual Conduct Offenses

Under MCL 776.21(2), “[a] law enforcement officer shall not request or order a victim [of any criminal offense listed in Section 7.13(A)(1)] to submit to a polygraph examination or lie detector test.” Additionally, MCL 776.21(2)-(3) prohibit a law enforcement officer from even informing such a victim of the option of taking a polygraph examination or lie detector, unless:

- F The victim inquires about such a test; or
- F The victim is told by a law enforcement officer that the defendant voluntarily submitted to a polygraph examination or lie detector test and the results indicated that defendant “may not have committed the crime.”

A “law enforcement officer” means “a police officer of a county, city, village, township, or this state; a college or university public safety officer; a prosecuting attorney, assistant prosecuting attorney, or an investigator for the office of prosecuting attorney; or any other person whose duty is to enforce the laws of this state.” MCL 776.21(1)(a).

### B. Admissibility at Trial

The results of a polygraph examination are inadmissible at trial, even by stipulation of the parties. *People v Barbara*, 400 Mich 352, 364 (1977), citing *Stone v Earp*, 331 Mich 606, 611 (1951). This policy of exclusion applies to civil and criminal cases. *Id.* While the exclusion is based partly on the rationale that polygraphs have not gained the required degree of acceptance or standardization among scientists, it is also based on the belief that “the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence.” *People v Ray*, 431 Mich 260, 265 (1988).

Notwithstanding this policy of exclusion, a defendant’s statements made *before, during, or after* the administration of a polygraph examination are not excludable per se as evidence under federal or state law or public policy. *Id.* at 268. However, such statements must be voluntary and not violate a defendant’s Fifth Amendment or Sixth Amendment right to counsel.

In *People v McElhaney*, 215 Mich App 269 (1996), a CSC defendant requested and was given a post-indictment polygraph examination. Before the examination, the polygrapher, a Michigan State Police Sergeant, advised defendant of his *Miranda* rights, which defendant waived by signing a written waiver. The polygrapher also told defendant that, although counsel was not allowed to be present in the examination room, defendant could stop the questioning at any time to consult with his attorney. In a post-polygraph examination, the polygrapher told defendant he did not believe that defendant was being truthful. Defendant then admitted to “accidentally” inserting his finger into the nine-year-old victim’s vagina. On appeal of his three CSC I convictions, defendant claimed that his right to counsel under the Fifth and

Sixth Amendments was violated by the post-indictment interrogation. On the Sixth Amendment issue, the Court of Appeals held that since defendant chose to initiate communications with the police, the advisement of *Miranda* rights was sufficient to effectuate a “voluntary, knowing, and intelligent waiver of defendant’s Sixth Amendment right to counsel.” *Id.* at 276-277. On the Fifth Amendment issue, the Court deferred to the credibility determination made by the trial court: that defendant did not specifically request counsel during the polygraph examination, as he said he did, and that he knowingly and voluntarily waived his *Miranda* rights before making any statements. *Id.* at 278.

### C. Polygraph Results Admissible in Post-Conviction Hearing for New Trial and in Pre-Trial Motion to Suppress

Under limited circumstances, a judge may admit polygraph results at a post-conviction hearing on a motion for new trial based on newly discovered evidence.\* Although the admissibility of polygraph evidence is within a judge’s discretion, the Michigan Supreme Court in *People v Barbara*, 400 Mich 352, 412-413 (1977), enumerated nine conditions that must be met before such evidence is admissible at a post-conviction hearing for a new trial:

“(1) The results of the polygraph tests are offered on behalf of the defendant.

“(2) The polygraph test was taken voluntarily.

“(3) The professional qualifications of the polygraph examiner are approved.

“(4) The quality of the polygraph equipment is approved.

“(5) The procedures employed are approved.

“(6) Either the prosecutor or the court may ask the subject of the polygraph examination to be examined by a polygraph operator of the court’s choice or such operator may be asked to review the offered data with the original operator, or both.

“(7) The test results shall be considered only with regard to the general credibility of the examinee not as to the truth or falsehood of any particular statement.

“(8) The affidavits or testimony of the polygraph operator shall be a separate record and shall not be used in any way at any subsequent trial.

“(9) A judge granting a new trial on the basis of polygraph tests shall not thereafter act as a trier of fact in that case but may preside with a jury. A substitute judge as trier of fact shall not be privy to the polygraph examination or results, or to the fact that a polygraph examination was taken or was in any way involved.”

The foregoing requirements also apply when considering polygraph examination evidence at pretrial motions to suppress. *People v McKinney*, 137 Mich App 110, 116-117 (1984) (trial court did not abuse its discretion in

\*See Section 9.6 for information on a defendant’s post-conviction right to a new trial based upon DNA evidence.

considering defendant's polygraph examination results in a motion to suppress a short-barreled shotgun found in a duffel bag in defendant's automobile, where court's decision rested on credibility determination between defendant and police officer).

In order to merit a new trial, a defendant must show that the evidence (1) is newly discovered; (2) is not merely cumulative; (3) would probably have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *People v Davis*, 199 Mich App 502, 515 (1993). If the only "newly discovered evidence" is the polygraph examination, this would not be a sufficient basis for granting a new trial because the results are inadmissible at trial and thus could not have "caused a different result." *Barbara, supra* at 412, n 45. See also *People v Cress*, 250 Mich App 110, 137 (2002), vacated in part on other grounds 466 Mich 882 (2002) (a polygraph test of defendant, because it serves only to duplicate evidence already heard at the jury trial, i.e., defendant's testimony denying guilt, is merely cumulative and is not newly discovered evidence).

Although a trial court has discretion to consider the results of a polygraph examination at a post-conviction hearing for new trial, it is an error of law for the court to fail to exercise that discretion, i.e., by failing to address or recognize the existence of polygraph evidence. *Id.* at 136-137.

#### D. References to Polygraph Examinations at Trial

Although the mention of a polygraph at trial is inadmissible, it does not always constitute grounds for a mistrial or reversible error. To determine whether reference to a polygraph constitutes reversible error, the Court of Appeals in *People v Kiczinski*, 118 Mich App 341, 346-347 (1982), quoting *People v Rocha*, 110 Mich App 1, 8 (1981), provided four factors for consideration. These factors, which trial courts may find relevant and useful, are as follows:

- F Whether defendant objected and/or sought a cautionary instruction;
- F Whether the reference was inadvertent;
- F Whether there were repeated references;
- F Whether the reference was an attempt to bolster a witness's credibility; and
- F Whether the results of the test were admitted rather than merely the fact that a test had been conducted.

In *People v Nash*, 244 Mich App 93 (2000), in response to the prosecutor's question, "So, then, why should we believe you?" a key prosecution witness, who was the only witness who directly implicated defendant during a jury trial for murder and felony firearm, stated, "That's up to you. I took a lie detector test." *Id.* at 96. The Court of Appeals, after analyzing the foregoing factors,

concluded that the reference to a lie detector test seriously affected the fairness of the trial and constituted reversible error:

“Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against defendant, gave a responsive answer to the prosecutor’s question that was posed with the intent of bolstering the witness’ credibility and was later repeated before the jury during deliberations, we believe that prejudice to defendant occurred.” *Id.* at 101.

In *People v Smith*, 211 Mich App 233 (1995), the prosecutor in a CSC II bench trial mentioned that defendant took a polygraph. Additionally, a copy of a detective’s report regarding the interview of defendant, titled “polygraph examination,” was filed in the circuit court’s record. Although the prosecutor did not mention the results of the polygraph, the Court of Appeals found that defendant’s failure of the polygraph was apparent from the officer’s testimony and from the timing of the polygraph examination, which was administered before defendant was charged with CSC II. The Court of Appeals held that, despite the circuit court’s finding of not being influenced by this information, the defendant was still unfairly prejudiced by the prosecutor’s injection of the polygraph and results “because it provided supposedly scientific evidence of defendant’s lack of credibility.” *Id.* at 235.

In *People v Ksters*, 175 Mich App 748, 755 (1989), lv gtd 434 Mich 900 (1990), lv den 437 Mich 937 (1991), the Court of Appeals held that a prosecution witness’ cross-examination testimony in a CSC jury trial that defendant had taken a polygraph in conjunction with a previous sexual abuse charge was “brief and inadvertent and . . . therefore harmless.” See also *People v Pureifoy*, 128 Mich App 531, 534-535 (1983) (no miscarriage of justice in a CSC jury trial where defendant was impeached with his prior statement to police in which he offered to take a polygraph examination, even though it was not later explained that defendant was never given an opportunity to take the examination).

## E. Privileged Communications

In Michigan, there is a polygraph operator privilege. MCL 338.1728(2) provides, in pertinent part:

“Any communications, oral or written, furnished by a professional man or client to a licensed [polygraph] examiner, or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state.”

In addition, MCL 338.1728(3) provides that “any recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the board

in accordance with [MCL 338.1707, the statute governing promulgation of rules by the state board of forensic polygraph examiners].”

A licensed polygraph examiner who examines a criminal defendant at the request of the defendant’s attorney also comes within the protection of the attorney-client privilege. *People v Marcy*, 91 Mich App 399, 406 (1979).

## 7.14 Privileges Arising From a Marital Relationship

This section addresses the two statutory privileges that arise from a marital relationship under MCL 600.2162:

### F Spousal privilege

MCL 600.2162(1)-(2) establish spousal privileges that limit the circumstances under which one spouse may “be examined as a witness” for or against the other spouse in civil, administrative, and criminal proceedings. This privilege is only applicable when the witness spouse and the non-witness spouse are married at the time of the examination. *People v Vermeulen*, 432 Mich 32, 35 (1989).

### F Confidential communication privilege

MCL 600.2162(4)-(7) establish confidential communication privileges limiting the circumstances under which an individual may “be examined” as to communications that occurred between the individual and his or her spouse during their marriage in civil, administrative, and criminal proceedings. This privilege applies whether the testimony is sought during or after the marriage, as long as the communication occurred during the marriage. *Vermeulen, supra*.

The foregoing statutes were amended by 2000 PA 182, effective October 1, 2000, and 2001 PA 11, effective May 29, 2001. Before 2000 PA 182 took effect on October 1, 2000, the nonwitness spouse held the privileges in all proceedings. Now, the person in whom the statutory privileges vest depends upon the nature of the proceedings. This marked a significant change from prior law, where criminal defendants were able to assert the privileges to keep their spouses from testifying. See, e.g., *People v Love*, 425 Mich 691 (1986) (reversible error found in denial of defendant’s motion to suppress wife’s testimony as to killing of third person).

In cases applying MCL 600.2162, the Supreme Court has narrowly construed the provisions that establish the privileges, and broadly construed the exceptions to the privileges. *People v Warren*, 462 Mich 415, 427 (2000). Accordingly, the Court has construed the language “be examined” in the statute to connote a narrow testimonial privilege, i.e., a privilege against being questioned as a sworn witness. The introduction of a spouse’s statement through other means is not precluded. See *People v Fisher*, 442 Mich 560,

573-576 (1993) (confidential marital communication privilege did not preclude consideration of defendant's wife's statements to detective, which became part of defendant's presentence report, at sentencing hearing); and *People v Williams*, 181 Mich App 551, 554 (1989) (spousal privilege inapplicable to statement by defendant's husband to 911 operator, which prosecutor sought to introduce by way of operator's testimony). See also *People v Smith*, 243 Mich App 657, 681-690 (2000), where the prosecutor conceded that the defendant's wife could not be called to testify but sought to introduce her statements under a hearsay exception.

**Note:** The cases cited above were decided before the amendments to MCL 600.2162 took effect on October 1, 2000 and May 29, 2001. However, the amendments did not change the basic nature of the spousal and confidential communication privileges.

## A. Spousal Privilege

The person in whom the spousal privilege vests depends upon the nature of the proceeding:

- F **Civil Actions and Administrative Proceedings:** The *non-witness* spouse holds the privilege, subject to certain statutory exceptions addressed below. MCL 600.2162(1) states: "[A] husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent . . . ."
- F **Criminal Prosecutions:** The *witness* spouse holds the privilege, subject to certain statutory exceptions addressed below. MCL 600.2162(2) provides: "[A] husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent . . . ."

In *People v Warren*, 462 Mich 415, 422 (2000), the Supreme Court described the characteristics of the spousal privilege:\*

- F The spousal privilege may be invoked only when the witness spouse and the non-witness spouse are legally married.
- F The spousal privilege precludes all testimony regardless of whether the events at issue occurred before or during the marriage.

The spousal privilege does not apply in the following situations:

- F Suits for divorce, separate maintenance, or annulment, MCL 600.2162(3)(a).
- F Prosecutions for bigamy, MCL 600.2162(3)(b).
- F Prosecutions for crimes committed against a child of either or both spouses, MCL 600.2162(3)(c).

\*The 2000-2001 amendments to the spousal privilege statute do not appear to have altered these characteristics.



- F Prosecutions for crimes committed against an individual who is younger than 18 years of age, MCL 600.2162(3)(c).\*
- F Actions that grow out of a personal wrong or injury done by one spouse to the other, MCL 600.2162(3)(d).
- F Actions that grow out of the refusal or neglect to furnish a spouse or children with suitable support, MCL 600.2162(3)(d).
- F Cases of desertion or abandonment, MCL 600.2162(3)(e).
- F Certain property disputes between spouses, MCL 600.2162(3)(f).

\*This exception  
took effect  
October 1,  
2000. 2000 PA  
182.

In addition, the privilege created in MCL 600.2162 is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F).

In the following cases, Michigan appellate courts addressed the scope of the “personal wrong or injury” exception to the spousal privilege. These cases are decided under the former “personal wrong or injury” exception contained in MCL 600.2162(3)(d). However, the current “personal wrong or injury” provision in MCL 600.2162(3)(d) does not differ significantly from its predecessor.

F *People v Warren*, 462 Mich 415 (2000):

After an argument in the family’s apartment, the defendant threatened his wife and began to tie her up. However, he was interrupted by the arrival of his sister-in-law, who took his wife and children to her home. Later, defendant’s wife and children went with the wife’s mother to the mother’s home. Defendant also went there, arriving before everyone else. He broke in and hid in the basement. At trial, defendant testified that he encountered his mother-in-law upon her arrival, struggled with her, and caused her to fall bleeding on the floor. Defendant’s wife testified that he beat and sexually assaulted her after the encounter with her mother. He then tied her hands and feet, gagged her mouth, and drove away in her mother’s car. Defendant’s wife eventually escaped to a neighbor’s house. Her mother was found dead in the basement.

The defendant was convicted of felony murder, two counts of CSC I, assault and battery, kidnapping, and unlawful driving away an automobile. On appeal, he asserted the spousal privilege, arguing that the trial court abused its discretion in allowing his wife to testify regarding the charges of murder, home invasion (the predicate felony on the felony-murder charge), and UDAA. Defendant argued that these crimes fell outside the scope of the personal wrong exception. The Supreme Court upheld the trial court’s decision to allow defendant’s wife to testify about all the crimes for which defendant was convicted. First, the Court approved of a “temporal sequence test” articulated in *People v Love*, 425 Mich 691, 709 (1986) (opinion of Williams, C.J.). Under that test, a criminal action can “grow out of” a personal

wrong or injury only if the testifying spouse was wronged before that action. *Warren, supra* at 425. Second, the Court expressed the following criteria:

“[W]e read the exception to allow a victim-spouse to testify about a persecuting spouse’s precedent criminal acts where (1) the underlying goal or purpose of the persecuting spouse is to cause the victim-spouse to suffer personal wrong or injury, (2) the earlier criminal acts are committed in furtherance of that goal, and (3) the personal wrong or injury against the spouse is ultimately completed or ‘done.’”

“Thus, where a persecuting spouse’s criminal activities have roots in acts ultimately committed against the victim-spouse, those preparatory crimes constitute ‘cause[s] of action that grow[] out of a personal wrong or injury done by one to the other . . . .’ MCL 600.2162(1)(d); MSA 27A.2162(1)(d). This is because the underlying intent, the ‘seed’ from which the other criminal acts grew, was the personal wrong or injury done to the spouse.” *Warren, supra* at 429.

Applying this test to the facts, the Supreme Court found that the defendant’s “purpose in embarking on his crime spree was to commit a personal wrong against or injury to his wife. He achieved this objective and all the crimes that he perpetrated grew out of it.” *Id.* at 431-432. After initially assaulting his wife at their home, the defendant broke into his mother-in-law’s home “in order to have access to his wife.” *Id.* at 431. He then assaulted, battered, raped, and kidnapped his wife. The crime of felony murder, based on the underlying felony of home invasion, grew out of those personal wrongs. After binding his wife, which indicated an intention to continue her secret confinement, he then took his mother-in-law’s car. The UDAA thus grew out of the kidnapping of his wife and came within the personal wrong exception to the spousal privilege. *Id.*

**F** *People v Vann*, 448 Mich 47 (1995):

The defendant was convicted of felonious assault and felony firearm against another man. At trial, his estranged wife testified that she was leaving the victim’s home when she saw defendant approach her. She ran back into the victim’s house, where she heard a struggle at the door, breaking glass, and gun shots. A bullet struck her in the shoulder. On appeal, the defendant asserted that his wife’s testimony violated the spousal privilege. The Supreme Court disagreed and upheld the trial court’s decision to allow the wife to testify:

“[T]he prosecution’s evidence indicated that there was an assault on the defendant’s wife, and that it occurred contemporaneously with the assault on the third party. . . . [T]he offense committed against the third party . . . did ‘grow out of’ the personal wrong or injury done by the defendant to his wife.” *Id.* at 52.

**F** *People v Eberhardt*, 205 Mich App 587 (1994):

The defendant was convicted of larceny from a person and uttering and publishing after stealing his wife’s AFDC check from a letter carrier, forging

her signature on it, and cashing it at a supermarket. At trial, the defendant's wife identified the endorsement on the check as her name signed by the defendant. On appeal, the defendant claimed that the trial court should have precluded his wife's testimony under the spousal privilege rule. The Court of Appeals upheld the trial court's decision to admit the testimony under the personal wrong or injury exception:

“[T]he grocery store was not the only victim of the crime of uttering and publishing. We believe that the personal wrong or injury exception applies to this case because defendant's action . . . constituted a personal wrong against [his wife] by depriving her and her children of a benefit to which they were legally entitled.” *Id.* at 590.

F *People v Pohl*, 202 Mich App 203, 207-208 (1993), remanded on other grounds 445 Mich 915 (1994):

In this case, the Court of Appeals held that the destruction of personal property can constitute a personal wrong or injury. The Court applied the personal wrong exception to the spousal privilege where the defendant broke into the marital home in violation of a restraining order, damaged property, and removed personal property that had been in his wife's possession.

## B. Confidential Marital Communication Privilege

MCL 600.2162(4)-(7) create a privilege for confidential communications made between spouses during a marriage.\* However, unlike the spousal privilege, which may be asserted only during a marriage, the confidential marital communication privilege may be invoked during the marriage or after it has ended, as long as the communication was made during the marriage. The extent of this privilege is determined according to the nature of the proceeding:

F **Civil Actions and Administrative Proceedings:** “[A] married person or a person who has been married previously shall not be examined in a civil action or administrative proceeding as to any communication made between that person and his or her spouse or former spouse during the marriage.” MCL 600.2162(4). However, a married or previously-married person may *consent* to be examined as to communications during the marriage regarding the matters described in MCL 600.2162(3). MCL 600.2162(5)-(6). These matters are the same as the exceptions to the spousal privilege listed in Section 7.14(A).

F **Criminal Prosecutions:** “[A] married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage *without the consent of the person to be examined.*” MCL 600.2162(7). [Emphasis added.] However, this privilege does not apply to the matters described in MCL 600.2162(3). MCL 600.2162(7). These matters are the same as the exceptions to the spousal privilege listed in Section 7.14(A).

\*This privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F).

\*The 2000-2001 amendments to MCL 600.2162(4)-(7) do not appear to have altered these characteristics.

In deciding whether a communication was made during a marriage, the court may not inquire into the viability of the marriage at the time of the communication. *People v Vermeulen*, 432 Mich 32, 37-38 (1989). The confidential marital communication privilege is extended to marriages contracted under the laws of other jurisdictions, even if Michigan law does not recognize the form of marriage in question. *People v Schmidt*, 228 Mich App 463 (1998) (privilege applies to communications between persons married at common law under the laws of Alabama).<sup>\*</sup> In Michigan, the statutory language “any communication made . . . during the marriage” refers only to “confidential” communications between spouses.

The following cases address the nature of “confidential” communications:

**F** *People v Vermeulen*, 432 Mich 32 (1989):

Defendant filed for divorce from his first wife on October 28, 1985. He married his second wife on November 11, 1985, before his divorce was final. His second wife was killed on December 26, 1985. The judgment of divorce was entered on February 7, 1986. Defendant was charged with murdering his second wife. Approximately one week before her death, defendant had spoken to his first wife and allegedly stated that he would kill his second wife if she left him. The prosecutor sought to have the first wife testify as to this conversation, to refute defendant’s claim that his second wife’s death was an accident. The Supreme Court held that the first wife’s testimony was barred by the spousal communication privilege:

“Although the statute speaks of ‘any communication,’ it is well-established in this state . . . that only confidential communications are protected by the communication privilege. It has been said that ‘a variety of factors, including the nature of the message or the circumstances under which it was delivered, may serve to rebut a claim that confidentiality was intended.’ . . . The nature of the marriage relationship immediately preceding or immediately after the communication is not, however, a circumstance respecting the communication that may be considered in determining whether it is confidential. . . . The nature and circumstances of the communication in the instant case do not rebut a claim that the communication was confidential.” *Id.* at 39-40.

**F** *People v Zabijak*, 285 Mich 164 (1938):

Defendant went to the home of his estranged wife with a gun and threatened to kill her and her baby. After shooting and killing the baby and shooting his wife through the mouth, he said he was going to kill her mother. He then went to the mother’s house and killed her. At trial, defense counsel objected to the admission of the wife’s testimony concerning threatening statements defendant made to her at the time of the shootings. The Supreme Court held that these statements were not “confidential” communications subject to privilege:

“[Defendant’s communications to his wife] were not in the nature of an admission or confession or an act of which she might otherwise

not be cognizant. Nothing was revealed in consequence of the privacy of the marriage relation. The statements testified to were in the nature of threats. They were made after the door of the house was closed and locked, but this was done . . . not to secure secrecy with regard to the statements made, but to prevent the escape of the wife and child to safety, and to insure that there would be no interference from others in the carrying out by the defendant of his murderous intentions.” *Id.* at 182.

**Note:** In *Vermeulen, supra* at 40, the Supreme Court explained that *Zabijak* was decided based on the nature of the communication and the circumstances in which it was delivered, as follows: “The statement in ‘the nature of threats’ in *Zabijak* concerned a contemplated assault that was an aspect of the same felonious transaction in which, and was uttered immediately after, the witness spouse had been shot and their baby killed.” The *Vermeulen* Court rejected the notion that a threat against a third person communicated to a spouse would fall per se outside the definition of a confidential communication. *Vermeulen, supra* at 40, n 9.

**F** *People v Byrd*, 207 Mich App 599 (1994):

Defendant was convicted of delivery of marijuana. On appeal, she challenged the trial court’s denial of her motion to quash the information based on entrapment. According to defendant, her estranged husband, acting as a confidential police agent, coerced her to deliver marijuana to an undercover police officer, using threats and promises not to contest their divorce. At the entrapment hearing, the defendant’s husband successfully invoked the confidential marital communication privilege through the prosecutor, asserting that his conversations with the defendant were confidential and could not be admitted through the defendant’s testimony. Because the defendant could not present her account of her conversations with her husband to support her motion to quash, the motion was denied. The Court of Appeals held that the defendant should have been permitted to testify at the entrapment hearing:

“A party may rebut a claim of confidential communication by showing, among other things, that the communication concerned ‘business matters transacted by one spouse as agent for the other.’ [Citations omitted.]

“Defendant alleged that her estranged husband called her repeatedly, pleading and making threats, and thereby induced her to act criminally. Then, the undercover officer came to defendant’s house, posing as the buyer . . . and obtained the marijuana pursuant to the husband’s prearrangement. Accepting defendant’s allegations as true, it is reasonable to infer that defendant acted as an agent for her husband.

“Moreover, it is equally reasonable to infer that the conversations between defendant and her husband were not intended by either party to be confidential. The sequence of events leading up to the first sale of marijuana makes it probable that defendant revealed to the officer at least some portions of the conversations with her husband, for example, the fact that she had spoken with her husband, that she knew the officer was coming, and that her husband told her

what to arrange. It is even more likely that defendant's husband revealed portions of the conversation to the officer." *Id.* at 602-603.

### C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

\*2000 PA 182,  
effective  
October 1,  
2000.

The Michigan Legislature, through its amendment\* to the spousal and marital communication privileges in MCL 600.2162, changed the competency of one spouse to testify against the other. As of this Benchbook's publication date, no Michigan appellate court has ruled on the retroactive effect of this amendment. The following discussion explores the law applicable to determining whether a statute is *ex post facto*.

The Ex Post Facto Clauses of the federal and state constitutions, US Const, art I, § 9, cl 3; Const 1963, art 1, § 10, were intended to secure substantive personal rights against arbitrary and oppressive legislation, and not to limit legislative control of remedies and procedure that do not affect matters of substance. *People v Russo*, 439 Mich 584, 592 (1992) (federal constitution) and *Riley v Parole Bd*, 216 Mich App 242, 244 (1996) (Michigan constitution). A statute that affects the prosecution or disposition of a criminal case involving a crime committed before its effective date violates the Ex Post Facto Clauses if it "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *People v McRunels*, 237 Mich App 168, 175 (1999), quoting *Riley*, *supra* at 244.

The United States Supreme Court has held that statutes which enlarge the class of witnesses competent to testify in criminal trials may be applied retroactively. In *Hopt v Territory of Utah*, 110 US 574, 587-590 (1884), the defendant was convicted of murder, in part by the testimony of a convicted felon. At the time of the alleged offense, controlling state law precluded convicted felons from being called as witnesses at trial. However, after the alleged offense but before defendant's trial, a statute was passed which repealed this law—thus permitting the convicted felon to testify at defendant's trial. In holding that this statute was not *ex post facto*, the Supreme Court stated:

"Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, *nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.* The crime for which the present defendant was indicted, the punishment prescribed therefor, and *the quantity or the degree of proof necessary to establish his guilt*, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was

committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential to conviction--only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.” *Id.* at 589-590. [Emphases added.]

Although *Hopt* was decided in 1884, the United States Supreme Court, in *Carmell v Texas*, 529 US 513, 543-544 (2000), quoted and relied upon the foregoing language to support its holding that a state statute authorizing conviction of certain sex offenses by uncorroborated victim testimony was *ex post facto* because it altered the legal rules of evidence and required less evidence to obtain conviction.

## 7.15 Privileged Communications with Care Providers

The Michigan Legislature has enacted a number of statutes that limit the use of communications with various care providers as evidence in civil or criminal trials. The following sections address communications that are subject to these statutory privileges, along with exceptions to the privileges.\*

**Note:** Further information about privileged communications can be found in Hagen and Rattet, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T M Cooley L Rev 183 (2000). The discoverability of crime victim statements to “victim-witness assistants” or “victim-witness advocates” acting as liaisons between crime victims and prosecutors is addressed in Miller, *Crime Victim Rights Manual* (MJJ, 2001), Section 5.7. On this topic, see *Commonwealth v Liang*, 747 NE2d 112 (Mass, 2001) (work of victim-witness advocates employed by prosecutor was subject to the same legal discovery obligations as that of prosecutors).

\*See Section 5.14(C)(3) for discussion on limitations of this privilege under a defendant’s due process right to discover exculpatory evidence. See also MCR 6.201(C)(2) and *People v Stanaway*, 446 Mich 643 (1994).

### A. Sexual Assault and Domestic Violence Counselors

Communications between a victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2), which provides:

“[A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.”

The scope of this privilege is determined by MCL 600.2157a(1), which provides the following definitions:

“(a) ‘Confidential communication’ means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim.

\* \* \*

“(c) ‘Sexual assault’ means assault with intent to commit criminal sexual conduct.

“(d) ‘Sexual assault or domestic violence counselor’ means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families.

“(e) ‘Sexual assault or domestic violence crisis center’ means an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.

“(f) ‘Victim’ means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence.”

MCL 600.2157a(1)(b) defines “domestic violence” with reference to MCL 400.1501(d). That statute is contained in the act creating the Michigan Domestic Violence Prevention and Treatment Board, and defines “domestic violence” as follows:

“(d) ‘Domestic violence’ means the occurrence of any of the following acts by a person that is not an act of self-defense:

“(i) Causing or attempting to cause physical or mental harm to a family or household member.

“(ii) Placing a family or household member in fear of physical or mental harm.

“(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

“(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 400.1501(d).

For purposes of this definition of “domestic violence,” “family or household member” includes:

“(i) A spouse or former spouse.

“(ii) An individual with whom the person resides or has resided.



“(iii) An individual with whom the person has or has had a dating relationship.\*

“(iv) An individual with whom the person is or has engaged in a sexual relationship.

“(v) An individual to whom the person is related or was formerly related by marriage.

“(vi) An individual with whom the person has a child in common.

“(vii) The minor child of an individual described in subparagraphs (i) to (vi).” MCL 400.1501(e).

The privilege in MCL 600.2157a is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F). It is also abrogated if the sexual assault or domestic violence counselor has a duty to report suspected child abuse or neglect to the Family Independence Agency under MCL 722.623(1), discussed in Section 7.15(F).

If applicable, the privilege created in MCL 600.2157a renders victim-counselor communications inadmissible as evidence absent a victim’s written consent. MCL 600.2157a(2).

**Note:** If a sexual assault or domestic violence counselor is licensed, certified, or identified as a social worker, psychologist, or other professional, other privileges may also apply, as discussed below.

## B. Social Workers

MCL 333.18513 protects communications between a social worker and a client. This privilege does not apply to:

- F Disclosures required for internal supervision of the social worker. MCL 333.18513(2)(a).
- F Disclosures made under the duty to warn third parties of threats of physical violence as set forth in MCL 330.1946. MCL 333.18513(4).
- F Disclosures made after the client, or a person authorized to act on the client's behalf, has waived the privilege. MCL 333.18513(2)(b).

The privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F). It is also abrogated if the social worker has a duty to report suspected child abuse or neglect to the Family Independence Agency under MCL 722.623(1), discussed in Section 7.15(F).

\*“Dating relationship” means “frequent, intimate associations primarily characterized by the expectation of affectional involvement.” MCL 400.1501(b). It does not include “a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.” *Id.*

## C. Psychiatrists and Psychologists

\*Regarding psychiatrists, see the next subsection, which addresses privileged communications with physicians.

With certain exceptions, the Mental Health Code shields communications made to a psychiatrist\* or psychologist from disclosure in “civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege.” MCL 330.1750(1). The fact of treatment is also privileged from disclosure. MCL 330.1750(1) and (3). See also MCL 333.18237, which provides that, without client consent, a psychologist or an individual under his or her supervision “cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.”

In a criminal context, the following exceptions to this privilege are pertinent:

- F Upon request, a privileged communication shall be disclosed in a criminal action arising from the treatment of the patient against the mental health professional for malpractice. MCL 330.1750(2)(d).
- F Upon request, a privileged communication shall be disclosed if it was made during an examination ordered by a court, if the patient was informed prior to the examination that the communication would not be privileged. Under these circumstances, the communication may only be used with respect to the particular purpose for which the examination was ordered. MCL 330.1750(2)(e).
- F A privileged communication may be disclosed pursuant to MCL 330.1946, which sets forth a duty to warn third parties of threats of physical violence. MCL 330.1750(4).
- F The privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F). It is also abrogated if the psychologist or physician\* has a duty to report suspected child abuse or neglect to the Family Independence Agency under MCL 722.623(1), discussed in Section 7.15(F).

\*While MCL 722.623(1) does not impose a duty to report for “psychiatrists,” it does impose such a duty on physicians and psychologists.

Additionally, in *People v Adamski*, 198 Mich App 133, 136-137 (1993), the Court of Appeals held that a complainant’s prior inconsistent statements made to a mental health therapist—that the defendant had not acted inappropriately to her—were admissible for impeachment purposes despite the bar of the statutory psychologist-patient privilege under MCL 330.1750. The Court of Appeals found that the privilege, even if absolute, must yield to a defendant’s right of cross-examination.

See MCL 330.1748 regarding the confidentiality of records of recipients of mental health services.

## D. Physicians

MCL 600.2157 provides in pertinent part:

“Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.”

This privilege protects not only verbal communications of confidential information made to a physician, but also “any information” that is “acquired” by a physician in the course of treating a patient, even if the patient is unconscious at the time the information is acquired. *People v Childs*, 243 Mich App 360, 367-368 (2000).

Under MCL 750.411(1)-(2), physicians and surgeons who are in charge of or are caring for a person “suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence,” must report the following to local law enforcement officials:

- F The name and residence of the wounded person, if known.
- F The whereabouts of the wounded person.
- F The cause of the injury.
- F The character and extent of the injury.

This duty to report also extends to “[a] person, firm, or corporation conducting a hospital or pharmacy in this state, the person managing or in charge of a hospital or pharmacy, or the person in charge of a ward or part of a hospital.” The report may include the identification of the perpetrator, if known. MCL 750.411(1). Failure to make the required report is a misdemeanor. MCL 750.411(3).

Further, MCL 750.411(6) provides that the physician-patient privilege and other health professional-patient privileges are not violated when the required report is made:

“The physician-patient privilege created under . . . MCL 600.2157, a health professional-patient privilege created under . . . MCL 333.16101 to 333.18838, and any other health professional-patient privilege created or recognized by law do not apply to a report made under subsection (1) or (2), are not valid reasons for a failure to comply with subsection (1) or (2), and are not a defense to a misdemeanor charge filed under this section.” MCL 750.411(6).

**Note:** Before the statutory amendments became effective April 1, 2001, MCL 750.411 did not expressly abrogate health professional-patient privileges in cases where injuries were required to be reported. Nonetheless, in *People v Traylor*, 145 Mich App 148, 150-152 (1985), the Court of Appeals held that the

statutory physician-patient privilege was qualified by the reporting statute. In that case, the Court ruled that a doctor could testify concerning matters he was statutorily required to report, i.e., his observations during treatment of the defendant's gunshot wounds.

Other exceptions to the physician-patient privilege exist in malpractice cases. MCL 600.2157.

The privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F). It is also abrogated if the physician has a duty to report suspected child abuse or neglect to the Family Independence Agency under MCL 722.623(1), discussed in Section 7.15(F).

### **E. Clergy**

MCL 600.2156 provides the following protection for communications made to a member of the clergy:

"No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."

The privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 7.15(F).

### **F. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect**

The Child Protection Law, at MCL 722.623(1), imposes a duty to report suspected child abuse or neglect to the Family Independence Agency, as follows:

"A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the [Family Independence Agency]. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act."

Consistent with the foregoing reporting requirements, MCL 722.631 provides as follows:

"Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute

grounds for excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law].”

MCL 600.2157a(2) specifically abrogates the privilege for communications between a sexual assault or domestic violence victim and a sexual assault or domestic violence counselor in cases where a report is required under the foregoing provisions of the Child Protection Law.

See also MCL 330.1748a and MCL 333.16281 (abrogation of physician-patient, dentist-patient, counselor-client, psychologist-patient, and other health professional-patient privileges when mental health or medical records or information is released, upon request, to the Family Independence Agency for investigation of suspected child abuse or neglect).

## G. Records Kept Pursuant to the Juvenile Diversion Program

Pursuant to MCL 722.828(1), and except as provided in MCL 722.828(2), records required to be kept under the Juvenile Diversion Act are open only by court order to persons having a “legitimate interest.” Such records are open to law enforcement agencies and court intake workers for the sole purpose of deciding whether to divert a minor. MCL 722.828(2). The act further provides that records kept under the act “shall not be used by any person, including a court official or law enforcement official, for any purpose except in making a decision on whether to divert a minor.” MCL 722.829(1).

In *People v Stanaway*, 446 Mich 643, 660-661 (1994),\* the Michigan Supreme Court stated that the “legitimate interest” in these records is arguably limited to situations in which a decision is being made concerning diversion of a minor. In light of this limited purpose, the Court in *Stanaway* held that records subject to these statutes were privileged from pretrial discovery in criminal proceedings, except to the extent required to protect the defendant’s due process rights. *Id.* at 678-680.

\*See Section 5.14(C)(3) for further discussion of *People v Stanaway*.

